88-1230

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES MANUEL, PETITIONER

v.

VETERANS ADMINISTRATION HOSPITAL; THOMAS W. SIMPSON; JAMES G. FASONE; JEROME HOBAN; PAUL VANCE; WILLIAM BEUTELL; and JAMES STEPHENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EASTERN DISTRICT OF MICHIGAN

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QUESTION PRESENTED

1. DOES THE PRIVACY ACT REQUIRE DISCLOSURE OF DOCUMENTS WHICH PURSUANT TO FEDERAL REGULATIONS ARE SUPPOSED TO BE INSERTED INTO A SYSTEM OF RECORDS WHERE A GOVERNMENT OFFICIAL FAILS OR REFUSES OR NEGLECTS TO OR PURPOSEFULLY PREVENTS DOCUMENTS FROM GETTING INTO THE SYSTEM OF RECORDS FOR HIS OWN PURPOSES?

TABLE OF CONTENTS

Opinion	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	5
Reasons for Granting Petition	20
Conclusion	36
Appendix A (Decisions below)	
Appendix B (Text of Statutes and Regulations)	

TABLE OF AUTHORITIES

STATUTES	PAGE
5 USC 552	5
5 USC 552(a) et seq	2, 3, 4,

REGULATIONS	PAGE
Code of Federal Regulations, MP-1, Part 2, Chapter 21, Apendix B, 32 VAOO	4, 31

CASE	PAGE
Grier v Kennan, 64 F2d 605 (C.A. 8, 1933)	25
Griggs v Duke Power Co. 401 US 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)	30
Local 2047 v Defense General Supply Center, 423 F. Supp 481, 485 (Ed Va 1976)	30
Sachs v Ohio National Life Insurance Co., 131 F2d 134 (C.A. 7, 1942)	24
Sablowski v U.S., 101 F2d 183 (C.A. 3, 1938)	24
Savarese v United States Department of Health, Education and Welfare, 479 F. Supp 304 (N.D. Ga. 1979)	29, 31, 32

Smiertka v United States Department of Treasury
447 F.Supp 221 (D.D.C. 1978) 18, 26, 27, 29

Udaul v Tall Man, 380 US 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1068) 31

Wren v Heckler, 744 F2d 86 (10th Cir. 1984) 29

Zeller v U.S., 467 F.Supp 487, 489 (1979) 25

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v.

VETERANS ADMINISTRATION HOSPITAL; THOMAS W. SIMPSON; JAMES G. FASONE; JEROME HOBAN; PAUL VANCE; WILLIAM BEUTELL; JAMES STEPHENS; ROBERT LeBLANC and MAYNARD ENOS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, CHARLES MANUEL, by his lawyers, PRATHER & FOLEY, P.C., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, infra 1A-18A) is reported at 857 F.2d 1112 (1988). The opinion and judgment of the District Court (App A,

infra 19A-62A) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App A, infra 1A-18A) was entered on September 28, 1988. This appeal is being docketed in this Court within 90 days from the entry of the Order below. The jurisdiction of this Court is invoked under 28 USC Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Privacy Act, 5 USC Section 552(a) et seq, provides in relevant part at Section 552a(d)(1):

> "(d) Access to Records. Each agency that maintains a system of records shall -
>
> (1) Upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a

copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence."

II. The Federal Privacy Act at 5 USC Section 552a(a)(5) provides in relevant part:

"The term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."

III. The Federal Privacy Act 5 USC 552a(a)(4) provides in relevant part:

"The term 'record' means any item, collection or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular

assigned to the individual, such as finger or voice print or a photograph."

IV. The Federal Privacy Act further provides at 5 USC 552a(e)(4) that:

"Each Federal agency which maintains a system of records shall publish in the Federal register, a notice of the existence and character of each and every system of records it employs."

V. The Code of Federal Regulations provides at MP-1, Part 2, Chapter 21, Appendix B, 32 VAOO, Veteran Employee and Citizen Health Care Facility Investigation Records as follows:

"System location: records are maintained at each of the VA health care facilities. Address locations are listed in VA Appendix 1 at the end of the document.

Categories of individuals covered by the system: . . . 11. 'Employees who have been accused of improper and unethical conduct.

follow up concerning employees, patients and private citizens, injuries, property damage, accidents, thefts, assaults, discrimination, complaints, elopements, unethical conduct, etc."

See Appendix B for the complete text of the applicable regulations and statutes.

STATEMENT

Like the F.O.I.A., the Privacy Act of 1974 (P.L. 93-579, 88 stat. 1897) is codified as part of the Administrative Procedure Act (5 USC Section 552a); the Act is designed "to give citizens more control over what information is collected about them and how that information is used." As stated in House Report #95-793,[1] the Privacy Act accomplishes this in five basic ways:

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[1]"A citizens guide on how to use the FOLA and the Privacy Act in requesting government documents, Thirteenth Report by the Committee on Government Operations, 95th Congress, 1st Session, House Report No. 95-793, Washington 1977, 1b."

"It requires agencies to publicly report the existence of all systems of records maintained on individuals. It requires that the information contained in these record systems be accurate, complete, relevant and up to date. It provides procedures whereby individuals can inspect and correct inaccuracies in almost all Federal files about themselves. It specifies that information about an individual gathered for one purpose may not be used for another without the individual's consent. And finally, it requires agencies to keep an accurate accounting of the disclosure of records and, with certain exceptions, to make these disclosures available to the subject of the record."

With the purposes underlying the enactment of the Privacy Act firmly in

in the Manuel case, in a light most favorable to the Plaintiff in order to see how the rulings of the trial court and the Court of Appeals have effectively emasculated and subverted the purposes behind the Act.

Charles Manuel, the Petitioner, brought this law suit against the Veterans Administration for alleged violations of the Federal Privacy Act, 5 USC Section 552a, et seq. At the time of filing this lawsuit, Charles Manuel was a black federal police officer at the Allen Park Veterans Administration Medical Center ("VAMC"). In December, 1980, Manuel became aware of an open detective position, under the supervision of Jerome Hoban, at the Palo Alto, California, VAMC. Manuel applied for the position pursuant to the requirements of VA Form SF171.

On December 28, 1980, Hoban interviewed Manuel over the telephone for the detective position. Several weeks later, Hoban again telephoned the Allen park VAMC and spoke to Lt. Ronald Hypes, Manuel's immediate supervisor, regarding Manuel's performance and capabilities. Hypes informed Hoban that Manuel was an efficient and punctual police officer.

In April of 1981, Manuel was contacted by Mr. Frank A. Menus, Personnel Management Specialist, Office of the Special Counsel, Washington, D.C. Mr. Menus discussed Manuel's application for the position of detective at the Palo Alto, California VAMC and informed Manuel that he was investigating some "irregularities in filling the detective post at Palo Alto."

Mr. Dreverskracht, a personal friend

the other four announced candidates had been awarded the position of detective at the Palo Alto, California VAMC by Hoban. Mr. Dreverskracht was not one of the original five finalists considered.

Mr. Menus asked Manuel if he would be willing to testify in an administrative proceeding against Mr. Jerome Hoban for violation of 5 USC Section 2302(b)(4), (6) and (8). Manuel agreed. Hearings were held on the complaints against Jerome Hoban in San Francisco, California, between November 18 and December 2, 1983. During the course of those hearings, Messrs. Simpson, Enos, LeBlanc and Fasone, all former individual defendants, testified. William Beutell, Associate Director of the Allen Park VAMC at the time, was also subpoenaed to testify but never took the stand. Hoban was ultimately found guilty

of violating 5 USC Section 2302(b)(4) with respect to Manuel.

Prior to the hearing, Thomas Simpson, Chief of Police, Allen Park VAMC, made numerous telephone requests to James G. Fasone, Regional Security Director, VA, commencing some time shortly before August of 1983, requesting that a special investigation be conducted at Allen Park VAMC by criminal investigators, Robert LeBlanc and Maynard Enos.

Three documents, copies of which Manuel sought to obtain under the Privacy Act, were generated by VA criminal investigators Robert LeBlanc and Maynard Enos. One Report of Contact dated October 15, 1983, signed by LeBlanc, reported that had he had seen VA Police Officer Manuel solicit and execute

three hard boiled eggs in the VAMC, Allen Park Canteen about 10:00 a.m. on that date.

A second undated Report of Contact signed by LeBlanc reported overhearing a conversation between Manuel and another VA Police Officer Ronald Hypes at the same Canteen on October 18, 1983, at about 10:30 a.m. The conversation involved the alleged tailoring of proposed testimony for the hearing to be held in November - December 1983 in San Francisco, California against Hoban.

The Uniform Offense Report, the third document, signed by LeBlanc, accused Manuel of theft of government property.

LeBlanc, who prepared all three documents, turned them over to Enos, his immediate supervisor, without retaining any copies. Together with other

documents, Enos turned over the Uniform Offense Report and the related Report of Contact (concerning Manuel's alleged underpayment for a cup of coffee and three hard boiled eggs) to then Associate Director Beutell of VAMC, Allen Park. Copies of the Uniform Offense Report and the related Report of Contact were sent to Fasone in Washington, D.C., and also initially kept by Enos in Livermore, California. The original Uniform Offense Report went from Beutell at VAMC, Allen Park to VA District Counsel MacMillan (in Detroit) and then to the United States Attorney's Office for possible criminal prosecution. The original Report of Contact (concerning the coffee and eggs), which Beutell kept temporarily in his desk at VAMC, Allen Park, after receipt from Enos, was destroyed by Beutell

Veterans Administration, District Counsel, John MacMillan, testified that Beutell's destruction of the Report of Contact was unauthorized and was not the appropriate course of action to take.

The third document at issue, the Report of Contact involving proposed testimony at the Hoban hearing, was not given by Enos to Beutell as the other two documents (no criminal or disciplinary action apparently being contemplated) were. Instead copies were sent to (1) Fasone in Washington; (2) the Office of Special Counsel (conducting the Hoban hearing); (3) VA District Counsel, San Francisco (monitoring the Hoban hearing); (4) Hoban; and (5) a copy was retained by Enos in Livermore, California.

Thus, the facts when viewed in the light most favorable to Mr. Manuel lead to the inescapable conclusion that in an

effort to discredit Manuel's testimony in the administrative hearing in Palo Alto, California in the case of Special Counsel versus Jerome Hoban, Messrs. Simpson, Enos, LeBlanc, Fasone and Hoban used the allegations of theft of government property and subordination of perjury against Charles Manuel contained in the Reports of Contact and Uniform Offense Reports.

The administrative law judge in the case of Special Counsel v Jerome Hoban made the following findings with respect to the credibility of Special Investigators, Enos and LeBlanc:

> "Aside from inconsistency in the testimony of Enos and LeBlanc, another telling aspect was their aptitude for making fortunate discoveries accidentally, such as happening upon and overhearing conversations of Manuel and Hypes in the Allen Park VAMC cafeteria, allegedly conspiring

was bizarre, smacked of serendipity, and simply was not reliable."

In spite of the inherent unreliability of the Reports of Contact and Uniform Offense Reports filed by LeBlanc and Enos against Manuel, Director Stephens, Assistant Director Beutell, Chief of Security Simpson, and Regional Security Director Fasone, allowed the two Reports of Contact and the Uniform Offense Report to be used to impeach Manuel's testimony in the matter of Special Counsel v Hoban. Thereafter, Simpson and/or Beutell failed to file the records in the pertinent systems of records as required by 32 VAOO or, alternatively, to bring the allegations against Manuel to his attention by any other means so as to afford Manuel a full and fair opportunity to rebut the accusations made against him.

Manuel made four separate requests for the Uniform Offense Reports and Reports of Contact contained within his employment file and on each occasion was informed that there were no such documents contained within his file. In response to the denials of his requests for records Manuel commenced litigation in the Wayne County Circuit Court against the Veterans Administration under the Privacy Act.

On March 11, 1987, following oral argument by counsel pursuant to Defendant's Motion for Summary Disposition, the Honorable Julian Cook granted the Defendant's Motion for Summary Disposition and his ruling from the bench stated in part:

> "The difficulty that the court had revolves around a situation such as that which has been described by Plaintiff wherein

> negligence, fails or refuses or neglects to or purposefully prevents a document from getting into the system for his own purposes.
>
> The court does not believe that the Privacy Act covers such a situation. Thus, the court believes that the Defendant's Motion for Summary Disposition should be granted."

Charles Manuel appealed the District Court's decision granting Summary Judgment in favor of the Veterans Administration to the Sixth Circuit Court of Appeals. He contended that the decision of the District Court was predicated on an overly technical reading of 5 USC 552a(d)(1). Specifically, Mr. Manuel appealed the District Court's ruling on two points: (1) the denial of access to three investigative reports or documents, and (2) the failure of the custodian of records to place those documents within the Veterans Administration's system of records.

The Court of Appeals affirmed the District Court on the first issue stating that: "It is clear considering relevant case law, the Privacy Act does not apply where documents at issue are not contained in the agency's 'system of records'. See Smiertka v United States Department of Treasury, 447 F Supp 221, 228-229 (D.D.C. 1978), vacated and remanded on other grounds, 604 F2d 698 (D.C.C. 1979).

Regarding the second issue, the Court of Appeals affirmed the trial court reasoning that the VA had no affirmative duty to place the records within the system of records; that the agency was not required to place information in its records at the request of an individual; and that under the Privacy Act the VA was only required to "maintain in its

individual as is relevant and necessary to accomplish a purpose of the agency " and because the records requested were not relevant or necessary to accomplish a purpose of the agency there was no duty to insert them in the system of records.

It is respectfully submitted that both the trial court and the Court of Appeals decisions should be set aside because: (a) they undermine and subvert the purposes behind the Privacy Act; (b) they misconstrue applicable case law; and (c) they fail to take into account the Federal regulation which imposes an affirmative obligation on the VA to insert the requested records into the system of records.

In 1974, Congress enacted the Federal Privacy Act and the remedial purpose which Congress intended the Act to have is most evident in the preamble

to the Act itself, which states:

> "A purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to - . . . collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information." Pub L. #93-579, Section 2(b)(4) 88 Stat. 1896 (1974), codified at 5 USC 552a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the personal privacy protections afforded to United States government employees by the Privacy Act. Should the District Court and Court of Appeals decisions be upheld, the congressional intentions behind enactment of the Privacy Act will be completely

failing to insert a document into a relevant system of records the governmental agency could side step the requirements of the Act that information contained in a "system of records" be accurate, complete, relevant and up to date; the procedures whereby individuals can inspect and correct inaccuracies in Federal records would be superfluous because there would not be any documents in the system of records; the requirement that information gathered about an individual for one purpose not be used for another purpose without the individual's consent would be meaningless; and finally, the requirement that agencies keep an accurate accounting of the disclosure of records would simply cease to exist as has occurred in the Manuel case.

This entire case hinges on the interpretation of the phrase "contained in the system of records". The Court of Appeals granted the Defendant's Motion for Summary Disposition stating that: "The custodian of this system at VAMC, Allen Park, is Thomas Simpson, Chief of Security Service. Mr. Simpson by affidavit swore that none of the three documents is or ever has been in his files". Quite simply this is not enough to support the Defendant's Motion for Summary Disposition on the basis that "the records were not contained in the system of records".

In order to determine whether the documents requested were contained within the system of records, we must look to the definitional sections of the Privacy Act; the term "system of records" is defined at 552a(a)(5) as follows:

> "The term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."

There is no dispute in this case that the documents requested referenced Mr. Manuel by name. In point of fact, these documents were generated for the sole purpose of impeaching Mr. Manuel's testimony in the case of Special Counsel v Jerome Hoban. The fact that Mr. Simpson either neglected to or failed to insert the records in his file cabinet does not mean they are not contained within a system of records. One can review the definitional sections of the Privacy Act line for line and nowhere does it say that the VA official charged with maintaining the system of records has to have the particular document

requested in his file cabinets. To the contrary, all the Act requires is that the information be retrieved by the name of the individual or by some identifying number. It is somewhat odd that the VA was able to retrieve these documents in order to impeach Mr. Manuel's testimony at the Hoban trial and yet when he requested them, they could not be located. It is respectfully submitted that this situation presents one of the dangers that the Privacy Act was specifically designed to address.

It is a well known principal of statutory construction that a remedial statute should be liberally construed in favor of the individuals it was designed to protect. Sachs v Ohio National Life Insurance Co., 131 F2d 134 (C.A. 7, 1942); Sablowski v U.S., 101 F2d 183 (C.A. 3, 1938); Grier v Kennan, 64 F2d

605 (C.A. 8, 1933)

The case of Zeller v U.S., 467 F Supp 487, 498 (1979) indicates that the Privacy Act is a remedial act; it was designed to protect government employees from intrusions on their privacy and destruction of their reputation and good names.

Logic dictates that it is insufficient for a Veterans Administration employee (or any Federal employee for that matter) in response to a request of records pursuant to 5 USC 552a(d)(1) to merely declare in an affidavit or otherwise, that he has checked his records and has determined that the requested records do not exist. To sustain such a response sabotages the purpose of this statute and flagrantly encourages the creation and use of secret records detrimental to the

government employee while never allowing that individual to see, confront or rebut that record because technically it is never placed into a system of records, despite the fact it is referenced by the individual's name. This practice has no place in free society or in the government of the United States!

In any event, the cases cited by the Court of Appeals simply have no application to the instant factual situation. For example, the Court of Appeals cited Smiertka v United States Department of Treasury, 447 F Supp 221 (D.D.C. 1978), vacated and remanded on other grounds, 604 F2d 698 (D.C.Circ. 1979) for the proposition that the items did not qualify as records in a system of records because they were not accessible by the Plaintiff's name or other personal identifier, but by the name of the agency

investigator who prepared them. In the Smiertka case, Plaintiff had requested access to a series of daily reports prepared by an agency investigator. The daily reports contained references to investigations conducted regarding the Plaintiff. The records were not accessible by the Plaintiff's name or other personal identifier, but rather by the name of the agency investigator who prepared them.

This is completely distinguishable from the facts in the Manuel case. The Uniform Offense Reports and the Reports of Contact were accessible by the Plaintiff's name. They were not documents prepared by the investigators as retained summaries of their work. Rather, they were specifically directed to Mr. Manuel. Hence, Smiertka is inapplicable.

In Manuel's case, there was not one iota of testimony or documentary evidence submitted that would support the proposition that these records were not accessible by the Plaintiff's name or other personal identifier. In point of fact, the reasonable inference is that these records were specifically prepared for the purpose of undermining and impeaching Mr. Manuel's testimony against Mr. Jerome Hoban. When it came time for Mr. Manuel to testify, the agency had no problem locating the records; it was only when Mr. Manuel requested them that the VA asserted that they were not contained within the system of records.

Regarding both the trial court and the Court of Appeals' ruling that there was no affirmative duty to place the requested records within a system of records, it is respectfully submitted

that both the trial court and the Court of Appeals failed to address the Federal regulations, specifically 32 VAOO which require that: "Copies of reports of investigations, . . . thefts, . . . and unethical conduct," be inserted in the system. Instead, the courts cite a number of cases which are simply inapplicable. For example, the Court of Appeals cited Savarese v United States Department of Health, Education and Welfare, 479 F Supp 304 (N.D. Ga. 1979), aff'd mem. sub. nom. Savarese v Harris, 620 F2d 298 (5th Cir. 1980), cert. denied, 449 US 1078, 101 S.Ct. 858, 66 L.Ed2d 801 (1981) for the proposition that an agency is not required to place information into its records simply because an individual requests such action and Wren v Heckler, 744 F2d 86 (10th Cir. 1984), for the proposition

that an agency is not required to place information in its records at the request of an individual. These cases are distinguishable and are simply not relevant to Mr. Manuel's situation. He never requested that the documents be inserted into a system of records; rather, the Federal regulations, 32VAOO specifically require that the documents be inserted into the system of records. Thus, the court's reliance upon these cases in inexplicable.

Agency regulations promulgated pursuant to specific Congressional authority are presumptively valid and entitled to great deference. Local 2047 v Defense General Supply Center, 423 F. Supp 481, 485 (Ed Va 1976). See also Griggs v Duke Power Co. 401 US 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Udaul v Tall Man, 380 U.S. 1, 16, 85

S.Ct. 792, 13 L.Ed.2d 616 (1968). In this case the applicable regulations 32 VAOO requires that Uniform Offense Reports should be put into the system of records. This regulation is entitled to deference and it is not sufficient that the Defendants have submitted an affidavit by the keeper of records indicating that the requested records were not contained within his file cabinet.

As the Court of Appeals neglected to mention, the Savarese court specifically stated: "Factual issues concerning reasonableness are not easily disposed of on summary judgment, and where, as here, the facts are clearly in dispute, summary judgment is particularly inappropriate." Id. page 307

Similarly, in this case, whether or not the agency acted reasonably is

disputed and it was inappropriate for the trial court to grant summary disposition and for the Court of Appeals to affirm the trial court's grant of summary disposition.

Further, in the Savarese case, the Defendant contended that the information was contained only in the general correspondence and program files and was not keyed for retrieval by means of names or name related identifiers; hence, there was no system of records. The Plaintiff agreed with this contention Id. page 307. Thus, the Savarese decision is completely distinguishable.

The Court of Appeals went on to quote Savarese, supra, for the proposition that the agency is required to:

> ". . . maintain all records which are used by the agency in making any determination about any individual with such

> accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual and the determination . . ."

Based on this quotation, the Court of Appeals concluded that all the Privacy Act requires is that the agency has done what is reasonable in insuring the accuracy of the information included, no more is required. (Court of Appeals decision, page 14) This is ludicrous! In point of fact, the presumption underlying the Privacy Act is that the agency will not do what is reasonable to insure the accuracy of the information and therefore it is necessary that the employee have access to these records so that he can insure the accuracy of the information. Nowhere in the transcript below does it indicate that the agency had done what is reasonable in insuring the accuracy of the information. In

point of fact, the administrative law judge in the administrative hearing in Special Counsel v Jerome Hoban made the following findings with respect to the credibility of special investigators Enos and LeBlanc:

> "The testimony of Enos and LeBlanc was bizarre, smacked of serendipity, and simply was not reliable."

The record below is quite simply devoid of any factual basis for the Court of Appeals' holding that the agency had done all that was reasonable in insuring the accuracy of the information.

Further, the Court of Appeals seemed to rely on the fact that there was never an official adverse determination or remedial action taken against Manuel based upon the documents at issue. In point of fact, the damage done to Mr. Manuel's reputation and his chances of promotion cannot be accurately accessed!

This is one of the primary motivating factors behind the enactment of the Privacy Act. It is simply impossible to calculate the damage done to reputation and the impairment of chances for advancement within an agency because of documents containing unfounded accusations against an employee. For this reason, Congress thought it appropriate to give employees an opportunity to respond to statements contained within employee records. There is no requirement that an employee must be able to demonstrate that the agency used the documents in making an adverse determination against the employee.

CONCLUSION

For all the reasons enumerated above, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Dated: December 20, 1988

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-1430

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES MANUEL,
Plaintiff-Appellant,

v.

VETERANS ADMINISTRATION HOSPITAL; THOMAS W. SIMPSON; JAMES G. FASONE; JEROME HOBAN; PAUL VANCE; WILLIAM BEUTELL and JAMES STEPHENS,
Defendants-Appellees,
ROBERT LEBLANC; MAYNARD ENOS,
Defendants.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed September 28, 1988

Before: KEITH and WELLFORD, Circuit Judges; and HORTON, District Judge.*

ODELL HORTON, District Judge. Charles Manuel, the

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*The Honorable Odell Horton, Chief Judge of the United States District Court for the Western District of Tennessee sitting by Designation.

appellant, brought this lawsuit against the Veterans Administration for alleged violations of the Federal Privacy Act, 5 U.S.C. § 552a, *et. seq.* Mr. Manuel claims he was denied access to three Veterans Administration documents generated by special undercover investigators Maynard Enos and Robert LeBlanc who were assigned to a special investigative project at the VA Medical Center, Allen Park, Detroit, Michigan. Mr. Manuel charges the Veterans Administration failed to place the three documents generated by special investigators Enos and LeBlanc into the Veterans Administration's system of records and that failure constitutes a violation of the Federal Privacy Act, 5 U.S.C. § 552a(d)(1).

The United States District Court for the Eastern District of Michigan granted summary judgment in favor of the Veterans Administration, finding Mr. Manuel had failed to state a claim under the Privacy Act for which relief could be granted.

The district court ruled the Privacy Act did not include the three documents involved in this case. In reaching its decision, the Court stated:

> The defendant VA has filed a Motion for Summary Judgment under Rule 56. The motion is directed to Count [II], which is the only remaining Count in [p]laintiff's [s]econd [a]mended [c]omplaint. Count [II] has been labeled by plaintiff as violation of the Privacy Act. Under Count II Plaintiff asserts that he has requested on, quote, at least two separate occasions, end of quote, copies of two Reports of Contact and [a] Uniform Offense Report. Plaintiff asserts that he is aware that the—a report does exist and believes that the reports have been intentionally or unintentionally mislaid. Plaintiff has also asserted that, in response to the request that defendants Vance and Stephens have informed him that there are no Reports of Contacts or Uniform Offense

Reports within any of the VA files, plaintiff argues that this is in error.

In the instant Motion, the movant has attached an affidavit from defendant Thomas W. Simpson who, as the custodian of the 32VA00 system and Chief of the Security Service for the Veterans Administration Hospital in Allen Park, Michigan, asserts that he has examined the 32VA00 system and does not find any of the information contained therein.

Plaintiff argues that the defendant's Motion has been narrowly drawn. It was neither the intent — strike that. The plaintiff argues—strike that. The plaintiff argues, in response, that it is not the intent of the Congress to make such request on the Privacy Act so narrow in scope so as to allow an abuse of the system, as he believes has occurred. The Court has found this motion to be troubling in the sense that an examination of the statute would, in the judgment of the Court, suggest that the—there are individuals who are required to maintain certain records. Plaintiff has correctly pointed out that under 32VA00, that records of veterans, employees and citizen .health care facilities investigation records are to be maintained at such VA health care facility, including the facility in Allen Park, Michigan.

Plaintiff has also pointed out that the records of employees, quote, who have been accused of improper and unethical conduct, end of quote, should also be maintained. The record in its present form indicates that the custodians of these records have ostensibly and/or presumably conducted an examination of the records and found the records—the system to be barren. The Court believes that the defendant, through its representatives, has fully sat-

isfied the language and the letter of the law. The difficulty that the Court has had revolves around a situation such as that which has been described by plaintiff wherein an individual who, for bad purposes or through negligence, fails or refuses or neglects to or purposefully prevents a document from getting into the system for his own purposes.

The Court does not believe that the Privacy Act covers such a situation. Thus, the Court believes that the defendants' Motion for Summary Judgment should be granted.

The Court has been troubled because the Privacy Act, as it apparently is presently constituted, allows or creates a situation whereby a well-meaning citizen of the United States can have his or her rights denied or at least thwarted by the purposeful or malicious actions of a government employee who has been charged with the responsibility of maintaining these records. However, the facts are clear and despite the belief or conjecture of the plaintiff, that Beutell, Fasone, Simpson and/or Vance have purposefully misdirected the information that he seeks. This Court is powerless to make a judgment to the contrary. Thus, in a technical sense, the Court concludes that there are not genuine issues of material fact with regard to this issue, and the Court will enter a Summary Judgment in favor of the defendant Veterans Administration as relates to Count [II], which, according to the records of the Court, is the only remaining count which remains in this case.

Now, if there can be some evidence, Mr. Foley or Mr. Manuel that—which would in someway account for the disappearance of the records, then I will entertain a motion to reinstate. But I have made my decision on a vary narrow basis, namely;

> that the record in its present form does not support the contention of the plaintiff that there has been a violation of the Privacy Act. The Court believes that the Privacy Act, as Mr. Foley has correctly pointed out, has many gaps. We believe this is a gap which the Congress should plug up.

Charles Manuel appealed to this Court the district court's decision granting summary judgment in favor of the Veterans Administration. He contends the decision of the district court was predicated on an overly technical reading of 5 U.S.C. § 552a(d)(1). Specifically, Mr. Manuel appealed to this court seeking a review of the district court's ruling on two points:

> (1) the denial of access to three investigative reports or documents, and
>
> (2) the failure of the custodian of records to place those documents within the Veterans Administration's system of records.

The facts in this case viewed in the light most favorable to Mr. Manuel are as follows. At the time of filing this lawsuit, Charles Manuel was a black federal police officer at the Allen Park Veterans Administration Medical Center ("VAMC"), with a December 11, 1979, seniority date. In December, 1980, Manuel became aware of an open detective position, under the supervision of Jerome Hoban, at the Palo Alto, California, VAMC. Manuel applied for the position pursuant to the requirements of VA Form SF171.

On December 20, 1980, Ms. Kathy Alfred, a secretary at the Allen Park VAMC, received a telephone call from an individual representing himself to be Jerry Hoban, Chief of Police, Palo Alto, California, VAMC, who asked to speak with Mr. Manuel. Ms. Alfred informed Hoban that Manuel was unavailable. Hoban then advised her that Manuel was being considered as one of the top five candidates for the position of detective at the Palo Alto, California, VAMC.

On December 28, 1980, Hoban interviewed Manuel over the telephone for the detective position. Several weeks later, Hoban again telephoned the Allen Park VAMC and spoke to Lt. Ronald Hypes, Manuel's immediate supervisor, regarding Manuel's performance and capabilities. Hypes informed Hoban that Manuel was an efficient and punctual police officer.

Sometime in April of 1981, a secretary in the personnel division at the Allen Park VAMC advised Manuel that Hoban had telephoned the Allen Park facility again and had requested that Manuel resubmit an application (VA Form SF171) for the position of detective at the Palo Alto, California, VAMC. Later in April of 1981, Manuel was contacted by Mr. Frank A. Manies, Personnel Management Specialist, Office of the Special Counsel, Washington, D. C. Mr. Manies discussed Manuel's application for the position of detective at the Palo Alto, California, VAMC and informed Manuel that he was investigating some "irregularities in filling the detective post at Palo Alto." Again, in late April of 1981, Manies spoke to Lt. Ronald Hypes, Manuel's supervisor and co-worker, regarding whether Hoban had telephoned the Allen Park VAMC and inquired about Manuel's suitability for filling the position of detective at the Palo Alto VAMC.

In June or July of 1982, Mr. Manies again contacted Manuel and informed him that: (a) Hoban denied ever speaking to Manuel regarding his application for the position of detective at the Palo Alto, California, VAMC, even though both Kathy Alfred and Lt. Hypes were present during Manuel's telephone interview and had spoken to Hoban themselves; (b) Hoban had said Manuel had not been considered for the position of detective since he had "failed to respond" to Hoban's inquiries; (c) five individuals were being considered as possible candidates for the detective position at the Palo Alto, VAMC; and (d) Manuel was candidate number five and his name had been taken off the list to make

room for the name of Mr. Dreverskracht, a personal friend of Hoban's.

Mr. Dreverskracht, instead of Manuel or one of the other four announced candidates, had been awarded the position of detective at the Palo Alto, California, VAMC by Hoban. Mr. Dreverskracht was not one of the original five finalists considered.

Mr. Manies asked Manuel if he would be willing to testify in an administrative proceeding against Mr. Jerome Hoban for violation of 5 U.S.C. § 2302(b)(4),(6),(8). Manuel agreed. Hearings were held on the complaints against Jerome Hoban in San Francisco, California, between November 18, and December 2, 1983. During the course of those hearings, Messrs. Simpson, Enos, LeBlanc and Fasone, all former individual defendants, testified. William Beutell, Associate Director of the Allen Park VAMC at that time, was also subpoenaed to testify but never took the stand. Hoban was ultimately found guilty of violating 5 U.S.C. § 2302(b)(4) with respect to Manuel.

Prior to the hearing, Thomas Simpson, Chief of Police, Allen Park VAMC, made numerous telephone requests to James G. Fasone, Regional Security Director, VA, commencing some time shortly before August of 1983, requesting that a special investigation be conducted at Allen Park VAMC by criminal investigators, Robert LeBlanc and Maynard Enos.

Three documents, copies of which Manuel sought to obtain under the Privacy Act, were generated by VA criminal investigators Robert LeBlanc and Maynard Enos. They were under the supervision of James Fasone, Washington, D.C. They were based in Livermore, California, but performed the requested undercover investigation at VAMC, Allen Park, concerning drugs between October 12-19, 1983. One Report of Contact dated October 15, 1983, signed by LeBlanc, reported that he had seen VA Police Officer Manuel solicit

and execute underpayment for a cup of coffee and three hard boiled eggs in the VAMC, Allen Park Canteen about 10:00 a.m. on that date.

A second undated Report of Contact signed by LeBlanc reported overhearing a conversation between Manuel and another VA Police Officer Ronald Hypes at the same Canteen on October 18, 1983, at about 10:30 a.m. The conversation involved the alleged tailoring of proposed testimony for a hearing to be held in November - December 1983 in San Francisco, California. The hearing was to be conducted by the Office of Special Counsel for the Merit Systems Protection Board against Jerome Hoban, VA Chief of Police, VAMC, Palo Alto, California, concerning alleged irregularities in filling the detective post at the VAMC, Palo Alto. Manuel as well as Simpson (later chosen as Allen Park Security Chief) were both unsuccessful candidates for the detective position.

The Uniform Offense Report, the third document, signed by LeBlanc listed three separate offenses that allegedly occurred on October 15, 1983, involving three different individuals, Donald Wright, conspiracy to sell marijuana; Walter J. Brewer, conspiracy to sell marijuana/sale of marijuana; and Manuel, "Theft of Government property." Of these three offenses, the only violation notice issued (*i.e.*, criminal charge brought) was against Brewer.

LeBlanc, who prepared all three documents, turned them over to Enos, his immediate supervisor, without retaining any copies. Together with other documents, Enos turned over the Uniform Offense Report and the related Report of Contact (concerning Manuel's alleged underpayment for a cup of coffee and three hard-boiled eggs) to then Associate Director Beutell of VAMC, Allen Park. Copies of the Uniform Offense Report and the related Report of Contact were sent to Fasone in Washington, D.C., and also initially kept by Enos in Livermore, California. The original Uniform Offense Report (with related Brewer Violation Notice) went from

Beutell at VAMC, Allen Park to VA District Counsel MacMillan (in Detroit) and then to the United States Attorney's Office for possible criminal prosecution without any copies being made or retained by Beutell (or anyone) at VAMC, Allen Park or MacMillan (or anyone) at VA District Counsel's Office, McNamara Building, Detroit. The original Report of Contact (concerning the coffee and eggs), which Beutell kept temporarily in his desk at VAMC, Allen Park, after receipt from Enos, was destroyed by him sometime in late October 1983 because of insufficient consequence to require further action.

The third document at issue, the Report of Contact involving proposed testimony at the Hoban hearing, was not given by Enos to Beutell as the other two documents (no criminal or disciplinary action apparently being contemplated). Instead copies were sent to (1) Fasone in Washington; (2) the Office of Special Counsel (conducting the Hoban hearing); (3) VA District Counsel, San Francisco (monitoring the Hoban hearing); (4) Hoban and; (5) a copy was retained by Enos in Livermore, California.

ACCESS TO RECORDS

The Privacy Act, § 552a(d)(1), specifically states:

> (d) Access to Records. Each agency that maintains a system of records shall —
>
> > (1) Upon request by any individual to gain access to his *record or to any information pertaining to him which is contained in the system,* permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that

> individual's record in the accompanying person's presence; (Emphasis Added).

5 U.S.C. § 552a(d)(1).

The access provision of § 552a(d)(1) is, therefore, confined to records or information within a system of records. The term "system of records" is defined within the context of the Privacy Act as:

> [T]he term "system of records" means *a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.* (Emphasis Added).

5 U.S.C. § 552a(a)(5).

The Privacy Act further requires each federal agency which maintains a system of records to publish in the Federal Register, a notice of the existence and character of each and every system of records it employs. 5 U.S.C. § 552a(e)(4).

Pursuant to § 552a(a)(5), the VA would have violated § 552a(d)(1) had the records sought by Mr. Manuel been contained within a system of records which included a group of records under the control of the VA from which information was retrievable by the name of Charles Manuel or by some identifying number, symbol or other identifying particular assigned to Charles Manuel. It is clear a system containing such records did not exist. Manuel and the VA agree the system of records applicable to the Uniform Offense Reports and Report of Contact requested by Manuel is entitled "32VA00, Veteran Employee and Citizen Health Care Facility Investigation Records" (hereinafter referred to as 32VA00). The custodian of this system at VAMC, Allen Park, is Thomas Simpson, Chief of Security Service. Mr. Simpson by affidavit swore that none of the three documents in question is or ever has been in his files.

It is clear, considering relevant case law, the Privacy Act does not apply where documents or information at issue are not contained in the agency's "system of records." *See Smiertka v. United States Dep't of Treasury,* 447 F.Supp. 221, 228-29 (D.D.C. 1978), *vacated and remanded on other grounds,* 604 F.2d 698 (D.C. Cir. 1979). There the Court stated the plaintiff was not entitled to access to a series of daily reports prepared by an agency investigation. The daily reports contained references to investigations conducted regarding the plaintiff. Such items did not qualify as "records" in a "system of records" because they were not accessible by the plaintiff's name or other personal identifier, but by the name of the agency investigator who prepared them. *Id.* at 229. In this case the record indicates the documents sought by Manuel were not included within the VAMC, Allen Park system of records under any name. Beutell admittedly destroyed one document because the incident cited therein was of "insufficient consequence to require further attention." This Court has ruled in *Hanley v. United States Dep't of Justice,* 623 F.2d 1138 (6th Cir. 1980), that records not kept within a system of records are not protected under the Privacy Act. *See also Fagot v. FDIC, et al.* 584 F.Supp. 1168 (D.P.R. 1984), *citing Hanley* for the above proposition.

The Court, therefore, concludes Mr. Manuel's assertion that he was denied access to the three documents in this case in violation of the Privacy Act is without merit. The three documents in question were never a part of the system of records of the VA. The Privacy Act, § 552a(d)(1), therefore, was not violated by the VA when it denied Manuel access to the three documents to which he sought access.

DUTY TO PLACE RECORDS WITHIN A SYSTEM OF RECORDS

Having determined the district court was correct in ruling that records not kept within a system of records are not pro-

tected by the Privacy Act, this Court must now resolve the issue of whether 32VA00 imposes an affirmative duty on the Veterans Administration to place documents which fall within the agency's system of records in such a system. Specifically, Manuel alleges the three documents prepared by VA criminal investigators Enos and LeBlanc (two Reports of Contact and one Uniform Offense Report), which were used to impeach his testimony at the administrative hearing of Jerome Hoban for violations of 5 U.S.C. § 2302(b)(4), were not placed into his file at the VAMC, Allen Park, Michigan. Mr. Manuel claims the custodian of the records for the VA had an affirmative duty to place these documents into its system of records. The district court determined that the Privacy Act does not cover a situation where allegedly "an individual who, for bad purposes or negligence, fails or refuses or neglects to or purposely prevents a document from getting into the system for his own purposes." Manuel and the VA are, however, diametrically opposed as to whether 32VA00 imposes an affirmative duty on a VA employee (custodian of the system of records) to place documents which fall within the ambit of 32VA00 into the "system" or whether the decision to place the document in the system in the first instance is left to the unfettered discretion of the VA employee. Manuel contends the relevant provisions of the Privacy Act impose an affirmative duty on VA employees to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5).

The Veterans Administration advances the argument that there is simply no duty imposed upon it by the Privacy Act requiring affirmative placement of a record into an agency's system of records, nor can there be any cause of action because of the failure to place a record in the system.

The VA points out, Manuel has failed to cite any existing case law which provides support for his argument that federal employees have an affirmative duty to place records within a system of records. Manuel in his brief submits that there are no Federal cases directly on point with the facts in this case.

Relevant case law indicates an agency is not required to place information in its records at the request of an individual. *See Wren v. Heckler*, 744 F.2d 86 (10th Cir. 1984). In *Wren*, the plaintiff, John L. Wren, brought a lawsuit against the Secretary of Health and Human Services and the Commissioner of the Social Security Administration claiming an unlawful withholding of documents which he had requested pursuant to the Privacy Act, 5 U.S.C. § 552a. The Tenth Circuit upheld the district court's decision granting summary judgment in favor of the Secretary and the Commissioner as the documents which Wren sought access were not "contained in a 'system of records', and [Wren was] therefore not entitled to access under the [Privacy Act]." 744 F.2d at 89. Although Wren made basically the same argument Manuel presents before this Court, i.e. "the documents in question should have been placed into his personnel file, to which he clearly has access pursuant to the [Privacy Act]" *Id.*, the court held an agency is not required to place information into its system of records merely because an individual requests that this be done. *See Id.* at 89, *citing Savarese v. United States Dep't of Health, Education & Welfare*, 479 F.Supp. 304 (N.D. Ga. 1979), *aff'd mem. sub nom. Savarese v. Harris*, 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981).

In *Savarese*, the district court, addressing the present issue stated:

> The agency is not required to place information into its records simply because the subject in question requests such action, and neither is the agency

required to remove information from its records upon request. The agency is, however, required to

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination . . .

5 U.S.C. § 552a(e)(5). This test of reasonableness has been applied by the courts in cases such as the present, so that if the court determines that the agency has done what is reasonable in assuring the accuracy of the information included, no more is required. *See Smiertka v. United States Dept. of Treasury*, 447 F.Supp. 221, 226 n.35 (D.D.C. 1978), *remanded on other grounds*, 196 U.S. App. D.C. 34, 604 F.2d 698 (D.C. Cir. 1979).

479 F.Supp. at 306.

Under 5 U.S.C. § 552a(e)(1), the Privacy Act further provides that each agency maintaining a system of records shall "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." The VA argues even if there was a cause of action under the Act for the *per se* failure to place a record into a system of records, the exclusion of § 552a(e)(1) for records not "relevant and necessary to accomplish a [required] purpose of the agency" would appear to apply since the three documents in question were not used by the VA in making any determination about Manuel and no criminal charges were levied against him. Mr. Beutell, Assistant Director of the Allen Park VAMC, admitted he actually destroyed one of the documents because, in his words, the incident was of "insufficient consequence to require further action."

According to the record, there was not, and never has been, an adverse determination or remedial action against Manuel made by the VA based upon the documents at issue. The existence of the documents were first discovered by Manuel while testifying in San Francisco, California, in late 1983 at the administrative hearing of Jerome Hoban for alleged improprieties in filling a vacant detective position at the VAMC, Palo Alto, California. Although introduced at the hearing for the sole purpose of impeaching the credibility of Manuel as a witness, the documents were never used by the VA nor was Manuel's conduct as an officer the subject of an official investigation. The "reports" were drafted by criminal investigators Enos and LeBlanc as a result of information gathered while investigating alleged drug activity by VA employees at the VAMC, Allen Park. There is no evidence these documents were to be used by the VA for official purposes outside of the special criminal investigation at the Allen Park VAMC.

It therefore was reasonable for the VA to not include these documents in the VA "system of records." The VA complied with the guidelines of 5 U.S.C. § 552a(e)(5), and its motion for summary judgment was reasonable in view of the use that was made of the documents. Therefore, we decline to adopt Manuel's contention that 5 U.S.C. § 552a *et. seq.* places an affirmative duty on VA employees to place records into a "system of records", particularly in the situation where documents are involved which are not part of an official agency investigation into activities of the individual requesting the records, and where the records requested do not have an adverse effect on the individual.

NONCONSENSUAL DISCLOSURE

Manuel further asserts his Privacy Act claim includes nonconsensual disclosure of records in violation of 5 U.S.C. § 552a(b) and the failure to maintain all records used by an agency in "making any determination about any individual with such accuracy, relevance, timeliness, and completeness

as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). In support of this claim, Manuel cites as authority *Bartel v. Federal Aviation Administration,* 725 F.2d 1403 (D.C. Cir. 1984). However, a review of the record shows Manuel apparently did not raise this claim before the district court as a ground for defeating the VA's motion for summary judgment. However, because this claim was cited by Manuel as grounds for reversal of the district court's order granting summary judgment in favor of the VA, we shall address the nonconsensual disclosure issue.

This Court finds Manuel's claim of nonconsensual disclosure of records in violation of 5 U.S.C. § 552a(b) inapplicable under the facts presented, as the three documents which he claims were "disclosed" were not records included in an agency's system of records and were not subject to the strictures of § 552a(b). In relevant part, 5 U.S.C. § 552a(b) reads as follows:

> (b) Conditions of disclosure. - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . .

The *Bartel* decision does not appear to support Manuel's position because the District of Columbia Circuit follows the interpretation of other circuits, including this circuit, that the wrongful disclosure provision, § 552a(b), applies only to an agency's systems of records, not to all agency records. *Bartel v. FAA,* 725 F.2d 1403, 1408, n.10 (D.C. Cir. 1984),[1] *Accord,*

[1]For this purpose, Manuel is not aided by the new ground cut by *Bartel* suggesting that "actual retrieval" from the agency system of records may be unnecessary when disclosure is made by a person who had a role in creating the record in the system of records which contains the information disclosed. *Bartel v. FAA,* 725 F.2d at 1408-11. Gaps could lead to agencies failing to index documents.

Hanley v. United States Dep't of Justice, 623 F.2d 1138, 1139 (6th Cir. 1980); *Doyle v. Behan*, 670 F.2d 535, 538-39 (5th Cir. 1982; *Johnson v. Dept. of Air Force*, 526 F.Supp. 679, 681 (W.D. Okla. 1980), *aff'd*, 703 F.2d 583 (Fed. Cir. 1982); *Savarese v. United States Dep't of Health, Education & Welfare*, 479 F.Supp. 304, 307 (N.D. Ga. 1979), *aff'd mem. sub nom. Savarese v. Harris*, 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

The other concern of Manuel involves the alleged violation of § 552a(e)(5) dealing with the accuracy, relevance, timeliness, and completeness of records maintained by an agency in making any determination about an individual. Manuel is concerned that records of employees "who have been accused of improper and unethical conduct" should be maintained. Indeed, the district court admitted it was troubled by the fact that the Privacy Act, in its current state, permits the situation whereby an employee may be deprived of his or her rights when an agency, or its custodian of records, purposely or with malice misdirects or prevents information from getting into the system of records. This Court concurs with the district court that there are gaps in the Privacy Act. This Court also recognizes those pertaining to an employee and thereby, preventing records from being entered into a system of records. The potential for abuse obviously does exist. *See Baker v. Dept. of the Navy*, 814 F.2d 1381, 1385 (9th Cir. 1987) *cert. denied*, 108 S. Ct. 450, 98 L.Ed.2d 390 (1987). However, it is the responsibility of Congress to fill in these gaps within the Privacy Act and clarify those areas and situations in which records must be placed within the agency's system of records. A federal agency should work towards maintaining accurate records concerning individual employees. Here there is no indication there was anything improper about the VA's failure to place potentially harmful documents into Manuel's 32VA00 file. There was no "determination" about Manuel made by the VA based upon the three documents at issue. The Court does not want to

give a signal to federal agencies that they should evade their responsibility to place records within their "system of records" in violation of the Federal Privacy Act, 5 U.S.C. § 552a, *et seq.* However, in this particular case there was no Privacy Act violation.

Therefore, as the documents were not used by the VA in any adverse determination or proceedings against Manuel, and were not "records" included in an agency's system of records, we decline to accept Manuel's contention that there was a nonconsensual disclosure of records by the VA in violation of 5 U.S.C. § 552a(b), or that there was a violation of 5 U.S.C. § 552a(e)(5), as he has failed to show that the VA made an adverse determination as a result of its inaccurate or incomplete records.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's decision granting summary judgment in favor of the Veterans Administration.

It is so Ordered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES MANUEL,

Plaintiff,

vs. CIVIL ACTION NO. 84-CV-3069-DT
HON. JULIAN ABELE COOK

VETERANS ADMINISTRATION,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Veterans Administration filed its motion for summary judgment (as to the last remaining count--Count II of the Second Amended Complaint alleging Privacy Act violation) with brief and attachments on January 30, 1987.

Plaintiff filed his answer to the motion with brief and attachments dated February 20, 1987.

Defendant filed its reply brief on February 27, 1987.

Hearing on the motion was held on March 11, 1987, both counsel appearing and being heard.

For the reasons stated on the record in open court, the Court found that there were no genuine issues of material fact raised by Plaintiff in opposition to Defendant's motion and it is hereby,

ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

Let Summary Judgment accordingly be entered.

JULIAN ABELE COOK, JR.
U.S. DISTRICT COURT JUDGE

Dated: March 27, 1987

APPROVED AS TO FORM ONLY:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES MANUEL,

Plaintiff,

vs. CIVIL ACTION NO. 84-CV-3069-DT
HON. JULIAN ABELE COOK

VETERANS ADMINISTRATION,

Defendant.
_____/

SUMMARY JUDGMENT

In view of the Court's Order Granting Defendant's Motion for Summary Judgment (as to the last remaining count--Count II of the Second Amended Complaint), it is hereby

ADJUDGED that Plaintiff is granted no relief and this action is dismissed with prejudice.

_____
Deputy Clerk

Dated: March 27, 1987

APPROVED:

JULIAN ABELE COOK, JR.
U.S. District Court Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES MANUEL,

Plaintiff,

vs. CIVIL ACTION NO. 84-CV-3069-DT

VETERANS ADMINISTRATION, et al,

Defendant.
_____/

MOTION FOR SUMMARY JUDGMENT

Proceedings held in the above-entitled matter, before the HONORABLE JULIAN ABELE COOK, JR., U.S. District Court Judge, at 237 U.S. Courthouse and Federal Building, Detroit, Michigan, on Wednesday, March 11, 1987.

APPEARANCES:

JOHN R. FOLEY, ESQ.

Appearing on behalf of Plaintiff.

FRANCIS L. ZEBOT, ESQ.
Assistant United States Attorney
Appearing on behalf of Defendant.

* * *

DENISE A. MOSBY, CSR-RPR
Federal Official Court Report
Detroit, Michigan

Wednesday, March 11, 1987

3:38 p.m.

- - -

MR. ZEBOT: Good afternoon, Your Honor. For the record, Assistant U.S. Attorney Francis Zebot, on behalf of the Veterans Administration.

This is our motion for summary judgment, Your Honor, on the sole remaining count in this litigation, which is Count 2 of the second amended complaint alleging Privacy Act violation.

THE COURT: Let me ask a question.

MR. ZEBOT: Yes.

THE COURT: Mr. Manuel, in his response to your motion, has said, in essence, that, quote, there are two other

systems which have direct application to the documents requested by Plaintiff: at page B-4, individual correspondence records - VA; and at page B-8, investigation reports of person allegedly involved in irregularities concerning VA laws, regulations, et cetera, dash VA, end of quote.

As I understand the facts -- and assist me if I'm in error.

MR. ZEBOT: Sure.

THE COURT: That Mr. Manuel claims that he has been unable to acquire or to obtain certain information from your client. A representative of your client, a Thomas Simpson, has indicated that he is the custodian of 32VA00 system and that there's nothing within that system which contains the information which Mr. Manuel points out.

As I understand Mr. Foley's response -- or Mr. Manuel's response, that he's saying that there are two other systems that -- where this information either is contained or may be contained or should be contained. I'm not certain if that is a proper characterization, but if it is, what is your response?

MR. ZEBOT: Well, first of all, I would like to point out, Your Honor, that I believe I attempted to address that in footnote one in any reply brief. But let me go through that. And I think it's important to understand that the - - that the appendix that I've attached is required by the Privacy Act. Every agency must list their systems of records and must give specific information with regard to that system of records.

Now, both of the systems that

he has referred to do not have applicability to our situation here. The one which appears at B-4 is 05VA026, deals with individual correspondence records, and it involves -- if one looks at the section I have indicated there in my footnote, the -- under categories of individual covered, in categories of records in the system, that this involves correspondence where action was taken either by the General Counsel's Office in Washington or the District Counsel's Office locally.

And the Court will also see, if you look at the -- if you turn over to Page B-5 -- I'm referring now to the attachment with my motion. In other words, that's where Mr. Foley is referring. If you look at B-5, you'll see that those records are kept -- well,

should be accessed through the Assistant General Counsel in Washington, D.C. We don't have a situation where -- you know, where any aspect of this system is invoked. In other words, all we have here is investigation records which he asks for, Uniform Offense Report, Reports of Contact. No allegation that he's seeking documents that relate to intersection by the General Counsel's Office in D.C. or District Counsel's Office locally.

THE COURT: What of the other system?

MR. ZEBOT: The other system he invokes is found, Your Honor -- one second. -- is 11VA051, and that's found at page B-8. Okay. If you look under categories of records in that system, there it's very clearly stated that these

relate to reports of investigation of the Office of the Inspector General. So these are Inspector General records which are kept in Washington, D.C. and are not records by the Department of Medicine and Surgery under the Security Office of Mr. Fasone. So these are completely unrelated records, Your Honor.

THE COURT: So you say that neither the -- I will use the last two digits.

MR. ZEBOT: Sure.

THE COURT: Neither the 26 nor the 51 systems are applicable here?

MR. ZEBOT: That's correct, Your Honor.

And also if you note at 51 -- again, although it's certainly not applicable, if there was any attempt -- any attempt to access would be through

Washington, D.C., the Office of the Inspector General there, under the access provision.

THE COURT: Could you once again -- you said B-4, and what was the other, B-11?

MR. ZEBOT: B-8, Your Honor.

THE COURT: B-8?

MR. ZEBOT: Yes.

B-4 deals with matters which are referred to General Counsel's Office for action, and action is taken and, you know, and B-8, that system of records refers to investigation by the Inspector General, which is a separate part of the VA system, which was not involved here.

THE COURT: All right.

MR. ZEBOT: Yeah. That's -- the Plaintiff has not contested the Simpson affidavit that the records were

not contained in the only relevant system of records here. Instead Plaintiff has argued two different points. And assuming arguendo the Court would permit him not to formally amend his complaint to bring those actions, even though we're after discovery and he has twice before amended the complaint, I would indicate to the court there is simply a failure to state a claim based on what he would like to bring before the Court.

The first is a simple claim that, okay, it wasn't in the system of records. Now, I want to complain about the failure to put it in the system of records; not give me access to it so I can correct it, but I want to complain about the failure to put it in the system of records. The problem is, there is no cause of action under the Privacy Act for

that simple claim. As I've pointed out in my reply brief at footnote three, there would be a cause of action in a situation where an individual has a record that, let's say, was favorable to that individual and if the agency made a determination that was adverse to the individual and because of the failure to get that record in the system, you would in effect have incompleteness of the record. Or if it was late, failure of timeliness of the record, you would under the provisions of 552a(g)(1)(C), could have a cause of action there if the failure to -- if that failure caused the adverse determination. But there is no -- there is no cause of action under the Privacy Act, or otherwise, against the agency for failing to put something in a system of records.

I have also suggested in footnote two, at the bottom of footnote two, furthermore, that there's a provision of the Privacy Act that says that the agency should only keep relevant -- records that are relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President. And I would submit here that these records, because there was no intention to bring any charges against Mr. Manual on the cup of coffee and three eggs, and there was no intent to bring disciplinary action, nor was any disciplinary action brought, nor likewise with regard to the conversation about preparing testimony for the hearing out in California, that for that additional reason it really shouldn't have been --

it shouldn't have been kept anyway, because they really weren't relevant and necessary for the purpose of the agency here.

So there's simply no -- but even if there were -- even if that were not true, there is no cause of action for that failure to put it in the system, and Mr. Manuel has not cited any authority in the Privacy Act, or otherwise, that would suggest anything different.

He argues that alternatively, though, that it would -- there was, quote-unquote, a reasonable obligation of various individuals to produce the documents requested by Plaintiff when someone in the agency, in effect, knew that the documents had not gotten into a system of records. Here, again, there is simply no cause of action under the

Privacy Act or otherwise. And the significance of that obviously is you have to have a waiver of sovereign immunity in order to proceed against the Government. Plaintiff cites no case law that would support such a cause of action.

And I would submit, as I do in the brief, that implicitly the cases that say for a -- for a cause of action under (d) (1) in the statue, failure of access must be to records in the system. The cases that I cited in the brief from D.C. Circuit and otherwise, Smiertka and Grachow, in effect simply say there is no obligation to seek out these other records that aren't in such a system. And, indeed, the OMB provisions for the Privacy Act point out the reason for that. Because if, in effect, there were

an obligation to seek it out anywhere, anywhere within the agency, there would be all the incentives in the world to have cross-indexing of various kinds so that the Privacy Act -- so that the privacy aspects of -- would be much, much worse for an individual. And it is precisely because that is not the case that you don't put this burden of tearing the agency apart to see if it can be anywhere.

There's simply no cause of action merely because the Plaintiff can point to an individual within the agency who knew or should have known that the record was somewhere in the agency, but not in the system of records. Again, the cause of action in the Privacy Act is confined to that system of records.

So I submit there is no choice

here, but to grant summary judgment. There is simply no cause of action that Claimant states against the United States for which there -- against the Veterans Administration for which there is a waiver of sovereign immunity.

THE COURT: All right. Thank you.

Mr. Foley.

MR. FOLEY: Good afternoon, Your Honor. John Foley for the Plaintiff Charles Manuel.

Your Honor, this case can appear to be very confusing if we, the Court and the attorneys, let it be. And I have a penchant for doing that, because it does appear to be confusing sometimes even for me. However, if I may, I would like to simplify your decision-making process to this extent. Disregarding for

a moment any other system other than the system cited by the Defendant, and that is 32VA00, and that is at page B-4. If you look at the lower left-hand corner, it's 21-App. B-24.

THE COURT: Just one moment.

I have 21-App. B-24.

MR. FOLEY: That's correct, Your Honor.

If you look in the 32VA00 Privacy Act issuance, "System Name: Veteran, Employee and Citizen Health Care Facility Investigation Records," if you look at "System Locations: Records are maintained at each of the VA health care facilities." And that is where my client worked at, Allen Park VAMC.

"Categories of Individuals Carried By the System," if you glance down through that paragraph to number eleven,

which is three sentences above the next, you know, bold-faced type, it says "Employees who have been accused of improper and unethical conduct." That certainly fits the description of what happened to my client. There's no question in all the deposition testimony that he was technically accused of theft of Government property. It is in writing. And we have produced those. It's there to be seen, and the Defendants' witnesses agree, he was. He was accused of theft of Government property.

So we move on, "Categories of Records in the System: Copies of reports of investigations, findings and follow-up concerning employees" -- and you can skip through the rest -- "and complaints . . . unethical conduct." So we have the

Enos and LeBlanc exit interview, with Mr. Beutell. Mr. Beutell testified at that interview, as was customary, they gave him all the data and the reports that they came up with, including the references to my client stealing hard-boiled eggs, theft of Government property. So his name is on there, and that's beyond dispute. Beutell admits they gave him that stuff. Mr. Simpson admits that he was in attendance at that exit interview to the extent that he wasn't in it, per se, but he waited outside the room where Enos, LeBlanc and Beutell met. And he was there. One might ask why. Well, he was the security director. He was nosing around and he was waiting. And in point of fact, he testifies that they came out and Mr. Beutell gave him evidence to hold.

Either Enos and LeBlanc directly did, or they gave it to Beutell and Beutell did. He says he got evidence. He got some money, copies of the ten dollars, et cetera.

Now we get to the interesting part. Director of security, Simpson makes it a point to be at the interview. He is humming around outside the door. Enos and LeBlanc are about to leave the station. Simpson testified that it was he who went to Beutell to start this investigation. Obviously, he has an interest. He was the one that was there, and Beutell is the one who ordered them there and sent them. So Mr. Simpson is there.

Now it gets even curiouser and curiouser, as it says. Lo and behold, he doesn't get a copy of the Contacts and

Uniform Offense Reports. I inquire isn't this somewhat odd? Yeah, it is kind of odd. Why? Well, normally I would get them. What do you mean, normally? Well, if it was my police officers on-site, I would absolutely have gotten these. I'm paraphrasing, obviously. The court has the transcript. If it was his police officers, he would get the reports. And would you then, Mr. Simpson, put them in your file? Oh, yes I would.

Now, bear in mind through this whole thing, nobody that I deposed had any comprehension whatsoever of what has been appended as an exhibit to Defendant's answer. I even went to Mr. Mac Millan, the VA attorney, and when I said, well, sir, you know, you're the provider here, give us an answer. What's supposed to be in this or not?

I'm not sure. I don't know. I got an objection from Mr. Zebot that I was characterizing him as an expert witness. Mr. Mac Millan didn't know what was supposed to be kept.

We had outdated destruction of Government property records brought in. The secretaries, who we always ultimately rely on, finally they tell us, well, this is what we use. It may be old. It might not be. But this is what we do. This is kind of incredible to the extent that while technically it exists, as a practical matter I can assure you that based on the deposition transcripts, nobody went to this and said, ah, system location VA, number eleven, categories and then Mr. Simpson went, oh, do I have to keep this or not, because this came from Enos and LeBlanc. He did not do

that. He made an independent evaluation, as we all do during the course of our business days, that, hey, these guys don't work for me, and he says that Beutell didn't give him a copy of it. Of course, I have no direct evidence to refute that, but I believe there's plenty of circumstantial evidence. He says I never got it; therefore, I didn't maintain it.

Well, I defy counsel to show me within 32VA00 where it says that it is up to the chief of security at the local VA to say this didn't come from my police officer; I'm not going to keep it.

It doesn't say that. It says to keep copies of reports of investigations, findings and follow-up concerning employees, blah blah blah, charged with unethical conduct.

And in point of fact, we went on, if the Court read, into hypotheticals. And I said, what happens if you did have this and you put it in there and, say, your boss asks you for it, what would happen? And this is of paramount importance, Your Honor, as you will see in a minute. He said, well, I would give it to my boss, but I would either keep a copy of it or give him the original of it and keep a copy because I am charged with keeping this in my files. That is where the problem lies, Your Honor, and that is where I think that this Court, in a bench trial as the finder of fact, can say to itself today there are disputed issues here. He says he never got it. I find that absolutely incredible. And --

THE COURT: What evidence would

you have or what evidence could you produce that would suggest that that statement is incredible?

MR. FOLEY: He was at the meeting literally standing -- and I had every witness describe the office suite at the VA where Mr. Zebot and I spent many a day. And it's a large area subdivided into little offices. The secretaries share some common areas. And Beutell Enos and LeBlanc went into one of the offices at the end of the hall. And Mr. Simpson, chief of security, who asked that these people come to his facility, waited outside the door. And he admitted that he even kind of overheard things going on and that, but he wasn't really in attendance. When they came out, if you can picture this in your mind, they say to the chief of security here, sir,

we want you to hold evidence; we want you to hold these twenty dollar bills that we mimeographed which are part of the money to buy marijuana, et cetera. And all this stuff is part of what we ultimately got through Office of Special counsel that contained my client's name being alleged with theft.

And it makes it even more incredible when you find Mr. Beutell, who is the boss (sic) of Mr. Simpson, Mr. Beutell admits in his affidavit, as I speculated and now he has confirmed it for me. I speculated all along that he just kept it in his desk. Well, lo and behold, there's the evidence and in the affidavits. And guess what? Beutell kept these in his desk drawer. Isn't that interesting. We have the chief of security standing at arms' length who we

just handed things to. But Mr. Beutell in this instant surveys this and says, geez, this hard-boiled egg thing really looks screwy to me; I'm going to keep this. And puts it in his desk drawer and, without informing anyone, without telling anyone, he says he destroyed it in the privacy of his own office.

Counsel for the VA says that for him to destroy that was absolutely wrong. He should not have destroyed that. Why shouldn't he have destroyed it? He should have given it to Mr. Simpson, and Mr. Simpson should have put it in this file.

And when my client wrote the letter both to Allen Park, VAMC and Washington who -- and I'm sorry I'm going on, but this is all up here and it's important. Washington says we don't have

this, Mr. Manuel; you may find it at Allen Park. Well, that's what Washington says; go to Allen Park. Why? Because it should be there. It's a copy of a report of investigation.

So what Defendants are now saying is that if employees in their individual discretion say, gee, I don't' feel like it today, I don't think this fits the bill and I'm going to throw it in my desk drawer, then it doesn't go in the system o records. We, the Plaintiffs, benefit from that, but in this case -- this was a nasty thing about my client. We don't benefit. That is wholly illogical. We are now in a position, Mr. Manuel and I, that we have no idea where this thing went. Why? Because like Mr. Simpson told me, if it went in the file, anybody that wanted it

goes to Mr. Simpson and says, hey, I want to see this, give me a copy. And he says okay, one copy to Mr. Fasone, one copy to Mr. LeBlanc, one copy to the prosecutor.

It is evident from these depositions that one hand did not know what the other was doing, I hope. I hope that's what it was. Or else they did know what they were doing and they were forcing me and my client to play a game of pin-the-tail-on-the-system-of-records. If it doesn't get into one or if it doesn't sit in one long enough for our correspondence to catch up with it, does that negate their obligation in the very first instance, under Mr. Zebot's system, not my other two, to put it in the system? Where does it say that it didn't have to go there, Mr. Beutell could hold it to himself, when Mr. Simpson says, you

know, in every other instance, these things go in my file? Why is that, sir? Well, I'm chief of security and police reports go in my file. Well, what makes this different, sir? Well, these guys weren't from my locale. I don't see that here, Your Honor.

THE COURT: Well, help me out, Mr. Foley.

Your client has asked for certain records. And Mr. Simpson has responded with a negative answer.

Let me assume, arguendo, that Simpson or any persons who were subordinate to him have acted negligently or even maliciously and have not placed the records -- the information into the system.

What remedy, if any, can this Court impose?

MR. FOLEY: Well, I believe that the law, the statute provides in the first instance that my client has to request the records and, within a certain time parameter, they, the VA, must respond by either producing the records or by offering some rationale for why they won't produce them. if they are privileged in some manner. Or in this instance -- and I believe this is extremely important in terms of contested or disputed issues of fact. As in this instance, as Mr. Mac Millan finally admitted, that it would have been reasonable for Mr. Beutell or -- and I apologize, I forgot this gentleman's name -- the information officer at Allen Park VAMC, who I also deposed, for those person to say to Mr. Manuel, sir --

THE COURT: Is that James

Stephens?

MR. FOLEY: No. That was the associate director.

MR. ZEBOT: Mr. Paul Vance.

MR. FOLEY: Mr. Vance. Thank you.

-- to say to Mr. Manuel these documents are not in the system of records here because they were never placed in one. However, you may find them thus and such; inquire to. And he could have written to the particular person. That was the reasonable thing to do here.

And I do not think that as a Federal Court Judge, enforcing Federal laws, that you would find it easy to continence a system of laws that would put an individual to the kind of burden that Mr. Zebot translates these into;

where if you don't specifically put that pin right on the donkey's tail, so-to-speak, that even if those records exist, that's tough. He made the inquiry to the proper place and had the records -- and I keep saying "had the records." Your Honor, I think, by circumstances, the trier of fact in this case might, after hearing the testimony, assume that, in fact, those records were in that system of records and that when my inquiry was made, me, personally, on behalf of my client, and even before that, that maybe somehow they weren't in that system of records anymore.

And it isn't a red herring that I bring up the destruction of documents by Mr. Beutell. I think that in a factual analysis, the Court has to question why a Government official in --

he's the individual in charge of Mr. Simpson, who says I never got these. This is the guy who destroys records without consulting with anyone. He took it upon himself to destroy that. Now, albeit he says he did it -- you know, in retrospect he did it because it was such an insignificant charge, he just didn't want to deal with it, he didn't think it merited anything. But in so doing, Your Honor, he took away the only way that we had to confront and rebut those charges; theft of Government property.

We were charged -- my client was charged with a criminal act. And to this day and time, I certainly don't, my client certainly doesn't have any idea where these things may have been disseminated to. And what Mr. Zebot proposes is that we accept their

affidavit simply saying, listen, we've hunted around; we can't find these things. And, yet, these are the same Defendants who, when I filed this complaint, the response was those things didn't exist. Well, they existed when I put them on my exhibits to the complaint. Then it shifted from, well, yeah, they exist, but they didn't exist in any system of records. Well, if the system of records at Allen Park VA were two doors down from Beutell and Simpson's office and Mr. Beutell puts them in his desk drawer, so there's the system and there's the desk drawer literally maybe 30 feet apart, and my client sends a letter in that says this is what I would like, does the trier of fact find it reasonable to assume that Mr. Beutell can read the letter and say, I know that

thing is in my desk drawer, but it ain't in the system of records, so he jots back a note, this doesn't exist here. And I do not believe -- and belief is all I can present, because there's nothing more in this act here. I do not believe that that's what the language of 32VA00 encompasses.

So just on that alone, Your Honor, I believe that the Court has what it needs to keep the case certainly to go to trial, a contested issue of fact.

THE COURT: All right. Thank you.

MR. FOLEY: Thank you, Your Honor.

THE COURT: Mr. Zebot.

MR. ZEBOT: Your Honor, Mr. Foley has simply not addressed the basic question here. He imagines various

things about his records. First of all, without any obtestation of either Mr. Simpson's affidavit or any of the other affidavits here. But let's just assume hypothetically that the record was somehow kept by someone at Allen Park separate from the system of records and it was not turned over, even though there's no basis by way of, you know, sworn affidavit or any testimony whatsoever. And I want to clear up one very grievous misimpression that Mr. Foley has made. But let's assume that happened. It might be desirable for the U.S. Congress to say it is inappropriate for that to exist, there are too many -- there's too much of a risk of abuse there, because perhaps somebody will whisper about this record to someone else and maybe that employee will suffer some

consequences as a result of that record being, you know, within the agency.

But that's not what the Congress did. The access provisions that Mr. Foley is talking about, the provisions for amending and correcting in the record refers only to systems of records. And, again, the theory is not that obtuse. The notion is that if someone wants to in general in the agency wants to do something adverse to an individual, he knows where to go. The system of records is in that individual's name. He goes to the security file. He goes to "Manuel". He says ah-hah, there is this stuff on Manuel. I won't give him that promotion, I won't do this, I won't do that. It might be better to have a broader law that might also cover records anywhere as in a desk drawer, but

there is no such law.

But factually, I would like to point out what Mr. Foley's version of the facts is just completely wrong. And Mr. Beutell's affidavit, which is perfectly consistent with his deposition testimony, he indicates that it was -- I say perfectly, and there may be a slight deviation in time. But I think he says a week later, paragraph six, he destroyed the Report of Contact that he kept temporarily in his desk. This is a week after October 19th of 1983. Mr Manuel's requests to the agency here are in January and following of 1984. So his testimony -- under his testimony the record is not there. There's no question that those responses are accurate not only as to records being in a system of records, which is all they have to be

responsive to, for purposes of the Privacy Act, but they are also factually correct that there's no record anywhere in VA.

In terms of Mr. Foley's suggesting that there is mystification here, this was an unusual investigation. It is not very often that there is an outside investigation directed from Washington within the hospital. That's why there's the confusion about what's the appropriate way to handle these records. They aren't our everyday records. They aren't staff citing somebody or writing up somebody within the system and that is why, in effect, they weren't kept there. But there is no cause of action.

Admittedly, the way it is written there is broad, broad evidence

that covers that. Even though Mr. Simpson thought not because it was directed by outside people, I believe the way the system was written up, it would seem to be broad enough to cover it. But there is no cause of action for not putting the record in the system. It makes perfect sense. What Mr. Foley is complaining about is, gee, it didn't get in there, so it would have caused me trouble because I would have wanted to clean it up. Well, it wasn't there to cause trouble in the system of records. So he speculates, well, it must have been floating around somewhere causing some kind of harm. There's no cause of action here, Your Honor.

THE COURT: All right. Mr. Foley, is there any law which would penalize an individual who negligently or

maliciously puts the information or data in his desk drawer and does not put it in the system?

MR. FOLEY: Believe me when I say, Your Honor, I have searched high and low. And I believe that the Court and counsel here must operate within the confines of the Privacy Act. And frankly, Your Honor, there are so many gaps -- I don't know any other words to use -- so many logical gaps as to what to do when you're faced with this situation. And I thank brother counsel for saying that this was an unusual circumstance. It was, and that's part of the problem.

I think that the act makes it clear that they have to either turn it over or say why not. They didn't turn it over and they didn't say why not. They could have. We would have been very

satisfied with that. Beutell destroyed it and there's nothing else left. I mean, to do that when my client first wrote the letter, none of this would have ever happened. But they kept insisting, even though we already had copies -- that's the incredible part.

You know, for Mr. Zebot to stand here now and say, well, gee, Foley is almost mad that this thing didn't get out there and hurt the guy, it did. I did. It was used purposely by Mr. Hoban and his counsel in an attempt to diminish the credibility of my client's testimony in the California proceedings. And in our other counts that we had -- and they are gone, but I mean certainly the rationale was that that was the reason that this report about hard-boiled eggs even came into being. And I think that

it would be properly part of the proofs at trial, not to prove damages under those dismissed counts, but for this Court to hear and understand why is it, why in the world did a hard-boiled egg theft charge ever come into existence. And we contend for the reason to discredit my client. And it was disseminated and we don't know where else it has been disseminated.

My gosh, Your Honor, we are amazed every time we get a new pleading -- and Lord knows we have had enough motions for summary disposition with affidavits -- that some new character in the cast now has seen it and held it and looked at it here, but I destroyed it. Everybody in the world has had this thing except my client.

THE COURT: Have you filed any

affidavits which assert the information that you have just presented to the Court?

MR. FOLEY: Your Honor, we did not file yet another affidavit in an attempt to rebut Mr. Simpson, because it was my determination -- and I trust that I was not in error. My client could obviously say Mr. Simpson is wrong and I say so. He doesn't have any direct knowledge of what Simpson did or did not do. I believe that under the rule, the deposition transcripts I can offer and I have to rebut his affidavit. I think that his affidavit does not ring true in view of his confusion about why he didn't file these.

THE COURT: Can you point to a page or pages or a line or lines within the Simpson affidavit -- Simpson

deposition that would refute or tend to refute his affidavit?

MR. FOLEY: Your Honor, I can. And I apologize to the Court. As you can see, this is the first time that I haven't brought all four of my file folders. I don't have the transcripts with me.

THE COURT: I have that which you filed --

MR. FOLEY: Within the context of what I have appended, I can point to lines in there, yes.

THE COURT: Just one moment.

MR. FOLEY: I might tell the Court that specifically what I would be looking for is that portion of his deposition wherein he admits that it was general practice for him to retain these, but he didn't in this instance because

they weren't his officers.

Your Honor, if you may, just as I go through this, at page nine -- basically page nine, there was a discussion regarding when Mr. Simpson first met with Enos and LeBlanc, and again, as a trier of fact, I think you would be entited to hear this. He met with them prior to them actually instituting their investigation, and he met with LeBlanc at a hotel room, off-station, which I -- you know, I asked him why was this. Well, you know, to shoot about old times. Did you mention anything about my client being out in California? At first he said no, and then later he corrected himself and he said -- well, at page eleven I said did you suggest to Mr. LeBlanc that he should follow --

THE COURT: Excuse me. Let me suggest this. I -- rather than to have you leaf page-by-page -- this is rather fragmented.

MR. ZEBOT: Your Honor, if the Court wants to give Mr. Foley an opportunity to point to certain pages -- I would, first of all, suggest that it's inappropriate in that he should have done this in his response to the motion. Instead he attaches, hey, I did several depositions, Your Honor; I did a lot of work here; let me stay around; here, I throw the depositions at you.

THE COURT: Well, I agree, but I want to make certain that if -- that especially in motions which ask for a disposition which, if granted, would have the effect of terminating the proceedings, to be reasonably certain

that there are no genuine issues of material fact to be resolved.

It would appear that there has been compliance, but I am troubled by the --

MR. FOLEY: Excuse me, Your Honor --

THE COURT: -- representation of Mr. Foley that there is information which would counter the Simpson affidavit.

MR. FOLEY: I have found a page that I was looking for.

THE COURT: Could you identify the page and line?

MR. FOLEY: At page 20, Your Honor, commencing at -- strike that. Page 19 commencing at line 19. "I am" -- this is me speaking.

"Q I'm going to show you what has

been previously marked as Fisher Exhibit No. 2 and ask you to peruse this, and ask you if you have ever seen those documents before?

"A All right. The whole...

"Q Each page, please. And we will go over them one by one after you have looked over the entire packet.

"A Okay.

"Q Have you had an opportunity to look at that?

"A Yes.

"Q We will get back to that in a moment. As regards Reports of Contact, if a Report of Contact is made by a Federal police officer on station here, what does he have to do with it? He

fills it out--" and then I stop.

"A Normally, the course of events would be that I would receive it, if it were one of my own people.

"Q In the circumstances that we're concerned with where Enos and LeBlanc were on station, would you not have received their Reports of Contact?

"A No.

"Q Why?

"A Because they weren't working for me. They were working for my associate director.

"Q What about a Uniform Offense Report, in the normal course?

"A In the normal course, I would receive a 1393 for

safekeeping.

"Q You get the original of that?

"A Yes. If it were a normal event, meaning one of my officers.

"Q In this circumstance, did you get a 1393 from Enos and LeBlanc?

"A No, I did not.

"Q Did you get a Report of Contact from them?

"A No, I did not.

"Q Did Mr. Beutell turn them over to you?

"A No, he did not.

"Q What rule, regulation, authority do you state to support the proposition that there is a distinction drawn between your officers and

someone from the outside in terms of your receipt of 1393's and Reports of Contact?

"A These people came from central office operation, okay. In my mind it was a central office operation. Their loyalty or their responsibility is to their boss. Their boss is James Fasone. Their boss is not me. And, to a lesser degree, their boss is William Beutell, not me, because, again, I was not privy to the knowledge of the investigation actually starting, and, therefore, most of the business was conducted through Mr. Beutell. So, I have no problem, per se, with that

arrangement.

"Q When you use the term 'arrangement,' that bespeaks of some prior plan of action between somebody. Did somebody arrange with you and tell you that you would not be in receipt of these documents?

"A No. no. That's not true, no. I was not prior -- well, again, I was not given prior knowledge of Mr. LeBlanc coming on station. And I was not privy to any agreement made between Mr. Beutell and Mr. LeBlanc and Enos, nor Mr. Fasone or Mr. Beutell. But as far as the efficacy of handling these document, I personally have no problem with the way they were

handled.

"Q Mr. Beutell's deposition at page 69, commencing with line 21, I'm going to read this into the record. You can read along.

"Question from myself to Mr. Beutell: 'And as an aside, but pertinent, isn't it a fact that the Reports of Contact, in terms of policy and procedure, are supposed to reside with the director of the facility? When a report of -- strike that -- when a Uniform Offense Report is filled out, isn't the original of that suppose to be routed to the director of the given facility?'

"Answer by Mr. Beutell: 'I don't believe so. I believe it's maintained by the chief of security in his office.'

"Do you agree or disagree, that you should receive the originals of these uniform offense reports?

"A There have been occasions, while I have been here, where an Offense Report has been filled out and I turned it over to the director for his safekeeping, based on the possibility of an employee being involved, and that was done. So I don't -- I don't --I'm saying that by precedent, this is not a precedent-setting transaction. And basically, again, I have no problem with the way it was handled in in a sense, because I or none of my people directly were going to be responsible for any kind of prosecution on this, as far as testifying."

THE COURT: Excuse me. How much more do you have?

MR. FOLEY: This is it. "This -- if anyone was going to do that, it would have been Enos and LeBlanc, and they do not work for me." Period. And I would just say this, Your Honor. He says this was an outside operation. They work for someone else. They do. They work for Mr. Fasone. Guess who Mr. Simpson works for? Mr. Fasone. And Mr. Simpson's affidavit attached to the motion, guess what? He kept copies of these Reports of Contact. So if he did, why didn't he tell the fellow on station as his subordinate, as his arm, so-to-speak, at each individual station, why didn't he keep them when he says he normally does and when the assistant director says normally he gives them to

him.

May I approach, Your Honor?

THE COURT: Yes.

MR. ZEBOT: Your Honor, may I speak briefly to that?

THE COURT: Yes, certainly.

MR. ZEBOT: I would indicate that Mr. Foley has not created any question of fact here as to Mr. Simpson's having the documents in his system of records. Every affidavit we've submitted by Mr. Simpson, most importantly, obviously, by Mr. Beutell, by Mr. Enos indicates that those records did not get to Mr. Simpson.

In terms of credibility, there's no incredibility here about it. It's very unusual to have this outside investigation. Mr. Beutell, the associate director, is very concerned

that this information not get out. Mr. SImpson is on the record as being someone who is a little bit too talkative. He had his FTS lines cut off because he's calling people all across the country and in other security offices. So there's nothing surprising about the fact that the records here were not given there. But the point is there's no inconsistency in any of the affidavits submitted by any of the principals here, and Mr. Foley simply has no basis for saying that there is an issue of fact that arises here as to whether these records were in the only available Privacy Act system at VA Allen Park.

Thank you.

THE COURT: All right.

The Defendant VA has filed a motion for summary judgment under Rule

56. The motion is directed to Count 2, which is the only remaining count in Plaintiff's second amended complaint. Count 2 has been labeled by Plaintiff as violation of the Privacy Act. Under Court 2 Plaintiff asserts that he has requested on, quote, at least two separate occasions, end of quote, copies of two Reports of Contact and Uniform Offense Report. Plaintiff asserts that he is aware that the -- a report does exist and believes that the reports have been intentionally or unintentionally mislaid. Plaintiff has also asserted that, in response to the request that Defendants Vance and Stephens have informed him that there are no Reports of Contacts or Uniform Offense Reports within any of the VA files, Plaintiff argues that this is in error.

In the instant motion, the movant has attached an affidavit from Defendant Thomas W. Simpson who, as the custodian of the 32VA00 system and chief of the Security Service for the Veterans Administration Hospital in Allen Park, Michigan, asserts that he has examined the 32VA00 system and does not find any of the information contained therein.

Plaintiff argues that the Defendants's motion has been narrowly drawn. It was neither the intent -- strike that. The Plaintiff argues -- strike that.

The Plaintiff agues, in response, that it is not the intent of the Congress to make such request on the Privacy Act so narrow in scope so as to allow an abuse of the system, as he believes has occurred.

The Court has found this motion to be troubling in the sense that an examination of the statute would, in the judgment of the Court, suggest that the -- there are individuals who are required to maintain certain records. Plaintiff has correctly pointed out that under 32VA00, that records of veterans, employees and citizen health care facilities investigation records are to be maintained at each VA health care facility, including the facility in Allen Park, Michigan. Plaintiff has also pointed out that the records of employees, quote, who have been accused of improper and unethical conduct, end of quote, should also be maintained. The record in its present form indicates that the custodians of these records have ostensibly and/or presumably conducted an

examination of the records and found the records -- the systems to be barren. The Court believes that the Defendant, through its representatives, has fully satisfied the language and the letter of the law. The difficulty that the Court has had revolves around a situation such as that which has been described by Plaintiff wherein an individual who, for bad purposes or through negligence, fails or refuses or neglects to or purposefully prevents a document from getting into the system for his own purposes.

The Court does not believe that the Privacy Act covers such a situation. Thus, the Court believes that the Defendant's motion for summary judgment should be granted.

The Court has been troubled because the Privacy Act, as it apparently

is presently constituted, allows or creates a situation whereby a well-meaning citizen of the United States can have his or her rights denied or at least thwarted by the purposeful or malicious actions of a Government employee who has been charged with the responsibility of maintaining these records. However, the facts are clear that despite the belief or conjecture of the Plaintiff, that Beutell, Fasone, Simpson and/or Vance have purposefully misdirected the information that he seeks. This Court is powerless to make a judgment to the contrary. Thus, in a technical sense, the Court concludes that there are no genuine issues of material fact with regard to this issue, and the Court will enter a summary judgment in favor of the Defendant Veterans Administration as

relates to Count 2, which, according to the records of the Court, is the only remaining count which remains in this case.

Now, if there can be some evidence, Mr. Foley or Mr. Manuel, that -- which would in someway account for the disappearance of the records, then I will entertain a motion to reinstate. But I have made my decision on a very narrow basis, namely; that the record in its present form does not support the contention of the Plaintiff that there has been a violation of the Privacy Act. The Court believes that the Privacy Act, as Mr. Foley has correctly pointed out, has many gaps. We believe this is a gap which the Congress should plug up.

All right. Mr. Zebot, I would ask you to prepare a proposed order and

submit it to Mr. Foley for his examination.

MR. ZEBOT: Thank you, Your Honor.

MR. FOLEY: Thank you, Your Honor.

THE COURT: Anything further?

MR. FOLEY: No, sir. Thank you.

THE COURT: All right. We will stand in recess.

(Proceedings adjourned at 4:40 p.m.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)

COUNTY OF WAYNE)

I, DENISE A. MOSBY, Official Court Reporter, in and for the United State District Court in the Eastern District of Michigan, Southern Division, do hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form under my supervision by means of computer-assisted transcription; and I do further certify that this is true and correct transcript of my stenographic notes so taken.

/s/
DENISE A. MOSBY, RPR-CSR
Official Court Reporter

DATED: July 28, 1987

PRIVACY ACT SYSTEMS

VETERANS ADMINISTRATION

INDEX TO VA SYSTEMS OF RECORDS

01VA022 Accredited Representatives and Claim Agents Records-VA

02VA135 Applications for Employment under Title 38, USC-VA

04VA113 Blood Donor File-VA

05VA026 Individual Correspondence Records-VA

06VA026 Claimant Private Relief Legislative Files-VA

07VA138 Department of Medicine and Surgery Engineering Employee Management Information Records-VA

08VA05 Employee Health Unit and Dispensary Records-VA

09VA05 Employee Unfair Labor Practice Charges and Complaints, Negotiated Agreement Grievances and Arbitrations-VA

10VA31 Employee Reporting System for

	Project Administration and Control (Data Processing Centers)-VA
11VA051	Investigation Reports of Persons Allegedly Involved in Irregularities Concerning VA Laws, Regulations, Etc. - VA
12VA01	Individual Requests for Information from Appellate Records-VA
13VA047	Individuals Submitting Invoices-Vouchers For Payment-VA
14VA135	Individuals Serving on a Fee Basis or Without Compensation (Consultants, Attendings, Others) Personnel Records-VA
16VA026	Litigant, Tort Claimant, EEO Complaint and Third Party Recovery Files-VA.
17VA26	Loan Guaranty Fee Personnel and Program Participant Records-VA
18VA05	Management Personnel Inventory-VA
19VA53	Missing Veterans File-VA
20VA138	Motor Vehicle Operator Accident Records-VA
22VA136	Patient and Employee Infectious Disease Records-VA

23VA136	Patient Fee Basis Medical and Pharmacy Records-VA
24VA136	Patient Medical Records-VA
27VA047	Personnel and Accounting Pay System-VA
28VA119	Personnel Registration Under Controlled Substance Act-VA
29VA11	Physician, Dentist and Supervisory Nurse Professional Standards Board Action File-VA
30VA136	Rejected Applicant for Medical Care Records-VA
32VA00	Veteran, Employee and Citizen Health Care Facility Investigation Records-VA
33VA112	Veteran, Fabricator and Employee Prosthetic Records-VA
34VA11	Veteran, Patient, Employee and Volunteer Research and Development Project Records-VA
36VA00	Veterans and Armed Forces Personnel U.S. Government In-Force Life Insurance Records-VA
37VA27	Veterans and Beneficiaries Guardianship Records-VA
38VA23	Veterans and Beneficiary Identification and Records Location Subsystem-VA

39VA047	Veterans and Dependents Inactive Award Account Records-VA
40VA42	Veterans and Dependents (Living and Deceased) National Cemetery System, Correspondence and Inquiry File-VA
41VA41	Veterans and Dependents National Cemetery Gravesite Reservation Records-VA
42VA41	Veterans and Dependents National Cemetery Interment Records-VA
43VA71	Veterans and Other VA Benefici-aries Who Have Responded to VA Sample Surveys-VA
44VA01	Veterans Appellate Records System-VA
45VA23	Veterans Assistance Discharge System (VADS)-VA
46VA00	Veterans, Beneficiaries and Attorneys U.S. Government Insurance Award Records-VA
48VA40B	Veterans (Deceased) Headstone or Marker Records-VA
53VA00	Veterans Mortgage Life Insurance-VA
54VA136	Veteran's Spouse or Dependent

	Civilian Health and Medical Care Records-VA
55VA26	Loan Guaranty Home, Condominium and Manufactured Home Loan Applicant Records, Specially Adapted Housing Applicant Records and Vendee Loan Applicant Records-VA
56VA119	Automated Medication Processing Records-VA
57VA125	Voluntary Service Records-VA
58VA21/22/28	Compensation, Pension, Education and Rehabilitation Records-VA
59VA31	Employee ADP Training Records-VA
60VA23	Repatriated American Prisoners of War-VA
62VA08	Resident Engineer Assignment System-VA
63VA05	Grievance Records-VA
64VA116	Vietnam Veterans Readjustment Counseling Program-VA
65VA122	Community Placement Program-VA
66VA53	Inspector General Complaint Center Records-VA
68VA05	VA Employee Counseling

Services Program Records-VA

71VA53 Office of Inspector General Management Information System-VA

73VA14 Health Professional Scholarship Program-VA

75VA001B Administrator's Official Correspondence Records-VA

VA Appendix 1 Addresses of Veterans Administration Facilities

32VA00
(Privacy Act Issuances,
1980 Comp., Vol. V, p.675)

SYSTEM NAME: Veteran, Employee and Citizen Health Care Facility Investigation Records-VA

SYSTEM LOCATION: Records are maintained at each of the VA health care facilities. Address locations are listed in VA Appendix 1 at the end of this document.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: 1. Veterans, employees and private citizens who have been injured as a result of accident or assault. 2. Veterans who have died as a result of violence or accident, such as, suicide, homicide, reaction to anesthesia or drugs, assault, transfusion accident, blood incompatibility, error in treatment, neglect of patient, fire,

firearms, explosion, etc. 3. Employees and private citizens who have died as a result of violence or accident. 4. Veterans who have left the health care facility without authorization. 5. Veterans, employees and private citizens who have alleged the loss of personal property, funds or valuables. 6. Veterans and private citizens who have alleged abuse by members of the health care facility staff. 7. Employees who have alleged discrimination, abuse or threats of violence by other employees, veterans and private citizens. 8. Veterans, employees and visitors who have assaulted other individuals. 9. Veterans, employees or private citizens who have been involved in the sale of illegal drugs or alcohol within the health care facility. 10. Veterans,

employees and private citizens who have been accused of stealing from other individuals or from the VA health care facility. 11. Employees who have been accused of improper and unethical conduct. 12. Veterans, employees and private citizens who have willfully or accidentally destroyed or damaged Federal property.

CATEGORIES OF RECORDS IN THE SYSTEM: Copies of reports of investigations, findings, and follow-up concerning employees, patients and private citizens, injuries, property damage, accidents, thefts, assaults, discrimination, complaints, elopements, unethical conduct, etc.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM: Title 38, United States Code, Chapter 3, Section 210(c)(1), and Title 38, United

States Code, Chapter 57, Section 3311.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. Transfer of required information to private insurance companies to determine whether payments of benefits are appropriate and determine liability.
2. Transfer of required information to local and State unemployment agencies to determine whether payments of benefits are appropriate.
3. Transfer of required information to the Office of Workers Compensation Program to determine whether payments of benefits are appropriate.
4. Transfer of required information to

attorneys representing employees, veterans or private citizens accused of unethical conduct to assist attorneys in representing their clients.

5. In the event that a system of records maintained by this agency to carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of

investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

6. A record from this system of records may be disclosed to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

7. A record from this system of records may be disclosed as a "routine use" to a Federal, State or local agency maintaining civil, criminal or other relevant information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other health, educational or welfare benefit.

8. Relevant information from this system of records, including the nature and amount of a financial obligation, may be disclosed as a routine use, in order to assist the

Veterans Administration in the collection of unpaid financial obligations owed the VA, to a debtor's employing agency or commanding officer so that the debtor-employee may be counseled by his or her Federal employer or commanding officer. This purpose is consistent with 5 U.S.C. 5514, 4 CFR 102.5, and section 206 of Executive Order 11222 of May 8, 1965 30 F.R. 5469).

9. Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

10. Disclosure may be made to NARS (National Archives and Records

Service) GSA (General Services Administration) in records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE: Paper documents and Photographs.

RETRIEVABILITY: Alphabetically by name.

SAFEGUARDS: Physical Security: Access to VA working space and medical record storage areas is restricted to VA employees on a "need to know" basis. Generally, VA file areas are locked after normal duty hours and are protected from outside access by the Federal Protective Service. Employee file records and file records of public figures or otherwise

sensitive medical record files are stored in separate locked files. Strict control measures are enforced to ensure that disclosure is limited to a "need to know" basis.

RETENTION AND DISPOSAL: Disposed of two years after case is closed.

SYSTEM MANAGER(S) AND ADDRESS: INVESTIGATIONS STAFF DIRECTOR (101F), VA Central Office, Washington, D.C. 220420.

NOTIFICATION PROCEDURE: Individuals seeking information concerning the existence and content of a record pertaining to themselves must submit a written request or apply in person to the appropriate VA health care facility. All inquiries must reasonably identify the incident involved and date of the incident. Inquiries should include the individual's full name and return

address.

RECORD ACCESS PROCEDURES: Veterans, employees and private citizens or duly authorized representatives seeking information regarding access to and contesting of VA records may write, call or visit the appropriate VA health care facility.

CONTESTING RECORD PROCEDURES: (See Record Access Procedures above.)

RECORD SOURCE CATEGORIES: 1. Veterans. 2. Employees of VA health care facility. 3. Other VA health care facilities, private physicians and dentists, or private hospitals and clinics. 4. Private citizens involved in the incident. 5. Federal, State, local and foreign law enforcement agencies. 6. Private insurance companies.

Public Law 93-579

AN ACT

To amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Privacy Act of 1974".

SEC.2.(a) The Congress finds that--

(1) the privacy of an individual is directly affected by the collection, maintenance, use and dissemination of

personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the

of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to --

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or

made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy

need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

SEC. 3. Title 5, United States Code, is amended by adding after section 552 the following new section:

"SEC. 552A. Records maintained on individuals.

"(a) DEFINITIONS. -- For purposes of this section --

"(1) the term 'agency' means agency as defined in section 552(e) of this title;

"(2) the term 'individual' means a citizen of the United States or an alien

lawfully admitted for permanent residence;

"(3) the term 'maintain' includes maintain, collect, use, or disseminate;

"(4) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

"(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

"(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

"(b) CONDITIONS OF DISCLOSURE. -- No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be --

"(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

"(2) required under section 552 of this title;

"(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

"(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

"(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by

United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an

individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES. -- Each agency, with respect to each system of records under its control, shall --

"(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of --

"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph

(1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS. -- Each agency that maintains a system of records shall --

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or

portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

"(2) permit the individual to request amendment of a record pertaining to him and --

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

"(B) promptly, either --

"(i) make any correction of any portion, thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the

individual of its refusal to amend the record in accordance with his request, the reason for the refusal the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after

his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

"(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the

agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

"(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

"(e) AGENCY REQUIREMENTS. -- Each agency that maintains a system of records shall --

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

"(2) collect information to the greatest extent practicable directly

the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual --

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may

be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include --

"(A) the name and location of the system;

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the

records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system;

"(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

"(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

"(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless

expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

"(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

"(9) establish rules of conduct for person involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the

penalties for noncompliance;

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

"(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES. -- In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall --

"(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his

request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost

of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

"(g) (1) CIVIL REMEDIES. --

Whenever any agency

"(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d)(1) of this section;

"(C) fails to maintain any record

concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

"(2) (A) In any suit brought under

the provisions of sub-section (g)(1)(A) if this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

"(B) The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(3) (A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the

determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

"(B) The court may access against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the

individual in an amount equal to the sum of--

"(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

"(B) the costs of the action together with reasonable attorney fees as determined by the court.

"(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of

action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as a result of a disclosure of a record prior to the effective date of this section.

"(h) RIGHTS OF LEGAL GUARDIANS. -- For the purposes of this section , the parent of any minor, or the legal guardian of any individual who has been

declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

"(i) (1) CRIMINAL PENALTIES. -- Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

"(2) Any officer or employee

of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

"(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

"(j) GENERAL EXEMPTIONS. -- The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c) and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b),

(c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

"(1) maintained by the Central Intelligence Agency; or

"(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal law, including policy efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of

criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.
At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

"(k) SPECIFIC EXEMPTIONS. -- The head of any agency may promulgate rules,

in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is --

"(1) subject to the provisions of section 552(b)(1) of this title;

"(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That it any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such

material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identify of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

"(4) required by statute to be maintained and used solely as statistical records;

"(5) investigatory material

compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the

objectivity or fairness of the testing or examination process; or

"(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

"(l) (1) ARCHIVAL RECORDS. -- Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

"(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record

which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

"(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other

value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

"(m) GOVERNMENT CONTRACTORS. -- When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such

contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

"(n) MAILING LISTS. -- An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

"(o) REPORT ON NEW SYSTEMS. -- Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other

personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation powers.

"(p) ANNUAL REPORT. -- The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully

this section.

"(q) EFFECT OF OTHER LAWS. -- No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.".

SEC. 4. The chapter analysis of chapter 5 of title 5, United States Code is amended by inserting:

"552a. Records about individuals."

immediately below:

"552. Public information; agency rules, opinions, orders and proceedings.".

SEC. 5.(A)(1) There is established a Privacy Protection Study Commission (hereinafter referred to as the "Commission") which shall be composed of seven members as follows:

(A) three appointed by the President of the United States,

(B) two appointed by the President of the Senate, and

(C) two appointed by the Speaker of the House of Representatives.

Members of the Commission shall be chosen from among persons who, by reason of their knowledge and expertise in any of the following areas--civil rights and liberties, law, social sciences, computer technology, business, records management, and State and local government--are well qualified for service on the Commission.

(2) The members of the Commission shall elect a Chairman from among themselves.

(3) Any vacancy in the membership of the Commission, as long as there are four members in office, shall not impair

the power of the Commission but shall be filled in the same manner in which the original appointment was made.

(4) A quorum of the Commission shall consist of a majority of the members, except that the Commission may establish a lower number as a quorum for the purpose of taking testimony. The Commission is authorized to establish such committees and delegate such authority to them as may be necessary to carry out its functions. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information necessary to the performance of their functions, and shall have one vote. Action of the Commission shall be determined by a majority vote of

the members present. The Chairman (or a member designated by the Chairman to be acting Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, other persons, and the public, and, on behalf of the Commission, shall see to the faithful execution of the administrative policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct.

(5) (A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that request to Congress.

(B) Whenever the Commission submits any legislative recommendations,

or testimony, or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendation, testimony, or comments to the Congress.

(b) The Commission shall--

(1) make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the

protection of personal information; and

(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of section 552a of title 5, United States Code, should be applied to the information practices of those organization by legislation, administrative action, or voluntary adoption of such requirements and principles and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.

(c) (1) In the course of conducting the study required under subsection (b) (1) of this section, and in its reports thereon, the Commission may research,

examine, and analyze--

(A) interstate transfer of information about individuals that is undertaken through manual files or by computer or other electronic or telecommunications means;

(B) data banks and information programs and systems the operation of which significantly or substantially affect the enjoyment of the privacy and other personal and property rights of individuals;

(C) the use of social security numbers, license plate numbers, universal identifiers, and other symbols to identify individuals in data banks and to gain access to, integrate, or centralize information systems and files; and

(D) the matching and analysis of statistical data, such as Federal

census data, with other sources of personal data, such as automobile registries and telephone directories, in order to reconstruct individual responses to statistical questionnaires for commercial or other purposes, in a way which results in a violation of the implied or explicitly recognized confidentiality of such information.

(2) (A) The Commission may include in its examination personnel information activities in the following areas: medical; insurance; education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing.

(B) The Commission shall include in its examination a study of--

(i) whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual;

(ii) whether the Internal Revenue Service should be prohibited from transferring individually identifiable data to other agencies and to agencies of State governments;

(iii) whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a (g) (1) (C) or (D) of title 5, United States Code; and

(iv) whether and how the standards for security and confidentiality of records required under section 552a (e) (10) of such title should be applied when a record is disclosed to a person other than an agency.

(C) The Commission may study such other personal information activities necessary to carry out the congressional policy embodied in this Act, except that the Commission shall not investigate information systems maintained by religious organizations.

(3) In conducting such study, the Commission shall--

(A) determine what laws, Executive orders, regulations, directives, and judicial decisions govern the activities under study and the extent

to which they are consistent with the rights of privacy, due process of law, and other guarantees in the Constitution;

(B) determine to what extent governmental and private information systems affect Federal-State relations or the principle of separation of powers;

(C) examine the standards and criteria governing programs, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information; and

(D) to the maximum extent practicable, collect and utilize findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and private bodies, institutions, organizations, and

individuals which pertain to the problems under study by the Commission.

(d) In addition to its other functions the Commission may--

(1) request assistance of the heads of appropriate departments, agencies, and instrumentalities of the Federal Government, of State and local governments, and other persons carrying out its functions under this Act;

(2) upon request, assist Federal agencies in complying with the requirements of section 552a of title 5, United States Code;

(3) determine what specific categories of information, the collection of which would violate an individual's right of privacy, should be prohibited by statute from collection by Federal agencies; and

(4) upon request, prepare model legislation for use by State and local governments in establishing procedures for handling, maintaining, and disseminating personal information at the State and local level and provide such technical assistance to State and local governments as they may require in the preparation and implementation of legislation.

(e) (1) The Commission may, in carrying out its functions under this section, conduct such inspections, sit and act at such times and places, hold such hearings, take such testimony, require by subpena the attendance of such witnesses and the production of such books, records, papers, correspondence, and documents, administer such oaths, have such printing and binding done, and

make such expenditures as the Commission deems advisable. A subpoena shall be issued only upon an affirmative vote of a majority of all members of the Commission. Subpoenas shall be issued under the signature of the Chairman or any member of the Commission designated by the Chairman and shall be served by any person designated by the Chairman or any such member. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(2) (A) Each department, agency, and instrumentality of the executive branch of the Government is authorized to furnish to the Commission, upon request made by the Chairman, such information, data, reports and such other assistance as the Commission deems necessary to

carry out its functions under this section. Whenever the head of any such department, agency, or instrumentality submits a report pursuant to section 552a (o) of title 5, United States Code, a copy of such report shall be transmitted to the Commission.

(B) In carrying out its functions and exercising its powers under this section, the Commission may accept from any such department, agency, independent instrumentality, or other person any individually identifiable data if such data is necessary to carry out such powers and functions. In any case in which the Commission accepts any such information, it shall assure that the information is used only for the purpose for which it is provided, and upon completion of that purpose such

information shall be destroyed or returned to such department, agency, independent instrumentality, or person from which it is obtained, as appropriate.

(3) The Commission shall have the power to--

(A) appoint and fix the compensation of an executive director, and such additional staff personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such

title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code. The Commission may delegate any of its functions to such personnel of the Commission as the Commission may desig-nate and may authorize such successive redelegations of such functions as it may deem desirable.

(4) The Commission is authorized--

(A) to adopt, amend, and repeal rules and regulations governing the manner of its operation, organization, and personnel;

(B) to enter into contracts or other arrangements or modifications thereof, with any government, any department, agency, or independent

instrumentality of the United States, or with any person, firm, association, or corporation, and such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5);

(C) to make advance, progress, and other payments which the Commission deems necessary under this Act without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529); and

(D) to take such other action as may be necessary to carry out its functions under this section.

(f) (1) Each [the] member of the commission who is an officer or employee

of the United States shall serve without additional compensation, but shall continue to receive the salary of his regular position when engaged in the performance of the duties vested in the Commission.

(2) A member of the Commission other than one to whom paragraph (1) applies shall receive per diem at the maximum daily rate for GS-18 of the General Schedule when engaged in the actual performance of the duties vested in the Commission.

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(g) The Commission shall, from time

to time, and in an annual report, report to the President and the Congress on its activities in carrying out the provisions of this section. The Commission shall make a final report to the President and to the Congress on its findings pursuant to the study required to be made under subsection (b)(1) of this section not later than two years from the date on which all of the members of the Commission are appointed. The Commission shall cease to exist thirty days after the date on which its final report is submitted to the President and the Congress.

(h) (1) Any member, officer, or employee of the Commission, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually

identifiable information the disclosure of which is prohibited by this section, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any person who knowingly and willfully requests or obtains any record concerning an individual from the Commission under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

SEC. 6. The Office of Management and Budget shall--

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section

552a of title 5, United States Code, as added by section 3 of this Act; and

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

SEC. 7. (A)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to--

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal,

State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

SEC. 8. The provisions of this Act shall be effective on and after the date of enactment, except that the amendments made by sections 3 and 4 shall become effective 270 days following the day on

which this Act is enacted.

SEC. 9. There is authorized to be appropriated to carry out the provisions of section 5 of this Act for fiscal years 1975, 1976, and 1977 the sum of $1,500,000, except that not more than $750,000 may be expended during any such fiscal year.

Approved December 31, 1974.